Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

OHIO SAVINGS BANK,

Petitioner,

vs.

THE ESTATE OF JOAN POPP,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Ohio

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Fourteenth Amendment to the U.S. Constitution prohibit conviction of a defendant for a quasi-criminal offense under Section 2109.52 of the Ohio Revised Code, when:

> (a) there is no evidence that the defendant committed any knowingly wrongful conduct or possessed a culpable mental state;
>
> (b) Ohio's highest court has required that knowingly wrongful conduct or a culpable mental state be proved; and
>
> (c) a mandatory fine at the level of an aggravated second degree felony is imposed on the defendant?

2. Do the Sixth and Fourteenth Amendments to the U.S. Constitution prohibit denial of trial by jury, conviction of a quasi-criminal offense upon summary judgment, and the imposition of a felony-level punishment, when:

> (a) the State has established the defendant's right to a jury trial in two (2) separate statutes; and
>
> (b) the defendant has duly demanded a jury trial?

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PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Roy E. Lachman and Marc W. Freimuth, Attorneys for Ohio Savings Bank, a wholly owned subsidiary of Ohio Savings Financial Corporation, petition for a writ of certiorari to review the judgment of the Ohio Supreme Court entered on September 21, 1994.

OPINIONS BELOW

The opinion of the Ohio Supreme Court was entered on September 21, 1994, is reported at 70 Ohio St.3d 1446 (1994), and is attached hereto at Appendix ("App.") 1.

The opinion of the Eighth District Court of Appeals for Cuyahoga County, Ohio, was entered on April 18, 1994, is reported at 94 Ohio App.3d 640 (Cuy. App. 1994), and is attached hereto at App. 2.

The Judgment Entry of the Probate Court of Cuyahoga County, Ohio was entered on October 3, 1992, and is attached hereto at App. 21.

JURISDICTIONAL STATEMENT

The opinion of the Ohio Supreme Court was entered on September 21, 1994. This Court's jurisdiction is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Amendment VI to the U.S. Constitution provides:

AMENDMENT VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

App. 27.

Amendment XIV to the U.S. Constitution provides in part that:

AMENDMENT XIV

> *Section 1.* All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within

its jurisdiction the equal protection of the laws. . . .

App. 27.

Section 2109.52 of the Ohio Revised Code provides:

§2109.52. Judgment on the complaint.

When passing on a complaint made under section 2109.50 of the Revised Code, the probate court shall determine, by the verdict of a jury if either party requires it or without if not required, whether the person accused is guilty of having concealed, embezzled, conveyed away, or been in the possession of moneys, chattels, or choses in action of the trust estate. If such person is found guilty, the probate court shall assess the amount of damages to be recovered or the court may order the return of the specific thing concealed or embezzled or may order restoration in kind. The probate court may issue a citation into any county in this state, which citation shall be served and returned as provided in section 2109.50, requiring any person to appear before it who claims any interest in the assets alleged to have been concealed, embezzled, conveyed, or held in possession and at such hearing may hear and determine questions of title relating to such assets. In all cases, except when the person found guilty is the fiduciary, the probate court shall forthwith render judgment in favor of the fiduciary or if there is no fiduciary in this state, the probate court shall render judgment in favor of the state, against the person found guilty, for the amount of the moneys or the value of the chattels or choses in action concealed, embezzled, conveyed away, or held in possession, together with ten percent penalty and all costs of such proceedings or complaint; except that such judgment shall be reduced to the extent of the value

> of any thing specifically restored or returned in kind as provided in this section.
>
> If the person found guilty is the fiduciary, the probate court shall forthwith render judgment in favor of the state against him for such amount or value, together with penalty and costs as provided in this section.

App. 32.

Section 2945.17 of the Ohio Revised Code provides:

> §2945.17. Right to trial by jury.
>
> At any trial, in any court, for the violation of any statute of this state, or of any ordinance of any municipal corporation, except in cases in which the penalty involved does not exceed a fine of one hundred dollars, the accused has the right to be tried by a jury.

App. 34.

STATEMENT OF THE CASE

The late Joan E. Popp was a savings depositor of Petitioner Ohio Savings Bank ("OSB"), having opened her passbook account in June, 1989. On January 31, 1991, Ms. Popp died. Her sister-in-law, Ms. Durma, retained Attorneys Marvin Schatz and William A. Hamann, Jr. to administer Ms. Popp's Estate and delivered to the attorneys Ms. Popp's OSB savings account passbook, along with passbooks and other account papers from four (4) other financial institutions. Ms. Durma intended that Mr. Hamann establish a Probate Court Estate for the decedent Joan Popp, be appointed its Administrator, open Estate bank accounts, and cause funeral bills and other Estate expenses to be paid.

Mr. Hamann specialized in Probate law, and the Cuyahoga County Probate Court had appointed him as its fiduciary for dozens of estates in the prior two (2) years. He had been a fiduciary for that Court for many years, and apparently enjoyed the Probate Court's trust

and confidence since it continued to appoint him as its fiduciary. See *State v. Hamann*, 90 Ohio App.3d 654, 666, 669, 630 N.E.2d 384 (Cuy. App. 1993), m.c.o. 68 Ohio St.3d 1445 (1994).

Rather than following the required Probate Court procedure, Attorney Hamann instead forged the signature of the Chief Judge of the Probate Court on five (5) Letters of Administration with seal, and forged the signature of the State of Ohio's Tax Commission Agent on five (5) Ohio Estate Tax Releases for the Estate of Joan E. Popp. On February 13, 1991 Mr. Hamann approached five (5) Cleveland, Ohio financial institutions at which the decedent's funds (then totalling $261,430.77) were on deposit. He presented each of the forged Court and Estate Tax documents, together with the account passbook and other account documentation, copy of death certificate and appropriate identification to each of these five (5) financial institutions. One of the institutions at which Attorney Hamann arrived, armed with his forgeries, was OSB. In reliance on the forged documents, and on the good faith belief that Attorney Hamann had been duly authorized to be the Administrator of the Popp Estate, OSB issued a check to him as such Administrator in the amount of $55,833.81.

OSB followed usual and customary bank procedures in dealing with the decedent's estate, and with Mr. Hamann as the apparent court appointed Administrator thereof and in relying on facially proper Court and Estate Tax documents presented with an authentic original passbook, copy of death certificate, and other appropriate documentation.

Attorney Hamann then deposited the OSB check, together with checks from the four (4) other Cleveland financial institutions, into his *personal* account at yet another financial institution. He proceeded to spend or otherwise dissipate the money. He never applied to be appointed Administrator for the Popp Estate.

Some weeks after Attorney Hamann's fraud upon OSB and the other financial institutions holding the late

Ms. Popp's accounts, these crimes and others came to the attention of prosecuting authorities and received extensive attention in the news media. Attorney Hamann pled guilty to thirty-eight (38) counts of theft, forgery and uttering, including thirty (30) counts of theft alone, and received a lengthy prison sentence for having stolen $2.5 million over a seven (7) year period while representing estates in the Probate Court. *State v. Hamann, supra.* The Cuyahoga County Court of Appeals found that OSB was one of Mr. Hamann's victims. *Id.* at 659. The Court further stated:

> The record demonstrates that defendant perverted the justice system for his own private gain by committing thirty separate and distinct acts of theft against dozens of different victims during his administration of probate assets over a period spanning more than seven years. Defendant compounded this wrongdoing by forging the names of a probate court judge and other public officials in an effort to conceal his scheme and to provide him a continued opportunity to enrich himself.
>
> *Id.* at 666.

When the Probate Court discovered these crimes against OSB and others, it appointed an Administrator for the Popp Estate. On July 23, 1991, the Administrator filed a Complaint, later amended, against Mr. Hamann, the institution where he deposited the proceeds of his crimes, Mr. Schatz, and the five (5) victimized financial institutions for having concealed, embezzled or conveyed away assets in violation of Ohio Revised Code Section 2109.52. App. 32 (the "embezzlement/concealment statute"). OSB demanded a trial by jury, as permitted by the statute. Although OSB and the other institutions protested that the Administrator was improperly criminalizing what should have been a simple debt action brought in a non-Probate Court setting, the Probate Court disregarded these protests and overruled motions directed toward this issue.

The original Probate Court judge, because he was "personally involved" in the situation, recused himself.

On July 15, 1992, the Probate Court granted the Administrator's motion for summary judgment against the incarcerated Mr. Hamann, finding him "guilty" of embezzling, concealing and conveying away Popp Estate assets, and imposing the ten percent (10%) statutory penalty on him. Mr. Hamann was already in prison as a result of his prior criminal conviction.

Thereafter, the Administrator moved for summary judgment against OSB. On August 13, 1992, OSB opposed the motion on numerous grounds, including that: (a) a quasi-criminal conviction of OSB under Ohio Revised Code §2109.52 would be unconstitutional since OSB lacked the requisite culpable mental state for a conviction; and (b) conviction by summary judgment in derogation of OSB's two statutory rights to a jury trial – under the embezzlement/concealment statute and Ohio Revised Code Section 2945.17 – was likewise unconstitutional. See App. 34. OSB also filed an affidavit stating that, based on investigation of Probate Court files and other records, the Probate Court had itself appointed Mr. Hamann as its fiduciary for at least thirty (30) estates during the two (2) years preceding his crime against OSB.

On November 3, 1992, the Probate Court granted the Administrator's motion for summary judgment. It found OSB "guilty" under Ohio Revised Code Section 2109.52, and entered judgment against OSB for $55,833.81, plus interest, plus a mandatory 10% statutory penalty, despite the fact that Mr. Hamann was the wrongdoer, in prison, and that OSB was one of his victims. *Hamann, supra*. The Court disregarded the fact that it had imposed the same 10% statutory penalty on Hamann four (4) months earlier. The 10% penalty of $5,583.38 was a felony-level sanction by statute. O.R.C. §2929.11(C),(2),(3). App. 33.

OSB appealed to the Cuyahoga County Court of Appeals. In its appeal brief filed on April 6, 1993, OSB again argued the Constitutional issues of conviction without *scienter*, and the denial of a jury trial. That Court

affirmed the Probate Court's judgment on April 18, 1994. App. 2.

OSB sought discretionary review by the Ohio Supreme Court, once again raising these Constitutional issues in its Memorandum in Support of Jurisdiction filed on June 15, 1994. That Court denied review of the conviction by a 6-1 vote on September 21, 1994. App. 1.

REASONS FOR ALLOWANCE OF WRIT

This appeal presents two (2) important issues for the Court.

First, the conviction of an accused that lacks *mens rea* has long troubled this Court. *Morissette v. United States*, 342 U.S. 246, 72 S.Ct. 240 (1952). A requirement of *scienter* is "no provincial or transient notion." *Id.* at 250. It is deeply rooted in, and fundamental to, our system of justice and moral character. In this case, OSB was convicted and fined when it was the victim of a crime, not the perpetrator, and when it lacked any *mens rea* and committed no knowingly wrongful conduct. Indeed, the Amended Complaint against Petitioner did not even allege *mens rea* or culpable conduct, even though Ohio's highest court had held that such culpable conduct or state of mind must be proved. *In Re: Estate of Black*, 145 Ohio St. 405, 62 N.E. 2d 90 (1945) (syllabus 2 and p. 411).

What distinguishes this case from many others is that, although OSB suffered the incidents of a felony conviction – finding of "guilty", mandatory felony-level fine, injuring of good name – the conviction occurred in the context of a special, "quasi-criminal" proceeding under Ohio law. *Goodrich v. Anderson*, 136 Ohio St. 509, 26 N.E.2d 1016 (1940). Thus, the State of Ohio has dispensed with a fundamental element of due process – pleading and proof of each element of an offense as a prerequisite to a criminal conviction – by terming "quasi-criminal" what is in substance and effect a criminal matter. How large a fine can a State impose upon an accused without pleading and proving *mens rea* or culpable conduct? How

freely can courts dispense with proof of *mens rea* or culpable conduct, as required by the State's highest court, when convicting an accused?

When the innocent victim of a crime is convicted of the same quasi-criminal offense as the judicially certified criminal perpetrator thereof, and automatically receives the same degree of felony-level fine, without regard to *mens rea* or culpability, but apparently on an unstated theory of strict liability, this Court should take action. It should also take notice of the context of the conviction: the Probate Court, embarrassed by an attorney whom it had repeatedly approved as a fiduciary, attempted to shift its responsibility for Mr. Hamann's plundering to one of his victims, who had less responsibility for Mr. Hamann's conduct than did the Probate Court itself!

Second, when a litigant in this type of quasi-criminal proceeding is specifically granted the right to a jury trial, the State of Ohio violates the U.S. Constitution by rendering a substantial money judgment and statutory penalty against the accused without providing such jury trial. As a matter of due process, when a state establishes a right – as it did here, in two (2) separate statutes – it cannot simply take that right away in order to accomplish the result it desires, a substantial monetary judgment and penalty against the accused. While summary judgment may be proper in a civil case on issues not "triable of right" by jury, F.R.Civ.P. 38(b), this was a quasi-criminal proceeding. The same statute that authorizes conviction also establishes the right to a jury trial when, as here, demand was made. Ohio Revised Code Section 2109.52. Further, all persons accused of violating a statute carrying a penalty in excess of $100 have the right to a jury trial under Ohio law. Ohio Revised Code Section 2945.17. Neither of these statutes contains any exception for conviction upon summary judgment, which is what occurred here in the process of depriving OSB of more than $70,000 by judgment and penalty.

Furthermore, under the Sixth Amendment to the Constitution, applicable to the States through Fourteenth

Amendment, an accused in a criminal proceeding is entitled to a jury trial when the offense charged is "serious," *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444 (1968), or when the penalty imposed is not merely "remedial," but punitive. *U.S. v. Halper*, 490 U.S. 435, 447, 109 S.Ct. 1892 (1989). Here, a respected financial institution that has served its community for over one hundred five (105) years has been discredited by a finding of "guilty," a conviction, and a felony-level fine for an offense that the Ohio Supreme Court has held to involve "a charge of wrongful or criminal conduct." *Black, supra* (syllabus 2). Thus, wholly apart from the State's denial of OSB's statutory rights to a jury trial which violated the Due Process Clause, the deprivation of a jury trial also violated the Sixth Amendment, as made applicable to the States by the Fourteenth Amendment to the U.S. Constitution. The Probate Court took this right away in order to avoid its own embarrassment at having made Mr. Hamann's $2.5 million theft possible by not supervising him, and in order to make sure that the embarrassment would end by causing certain victims including OSB to pay money and remain silent. See *Hamann, supra* at 658.

I. THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION PROHIBITS THE CONVICTION OF A DEFENDANT FOR A QUASI-CRIMINAL OFFENSE UNDER SECTION 2109.52 OF THE OHIO REVISED CODE, WHEN THERE IS NO EVIDENCE THAT THE DEFENDANT COMMITTED ANY KNOWINGLY WRONGFUL CONDUCT OR POSSESSED A CULPABLE MENTAL STATE, WHEN OHIO'S HIGHEST COURT HAS REQUIRED THAT SUCH CULPABLE CONDUCT OR MENTAL STATE BE PROVED, AND WHEN A MANDATORY FINE AT THE LEVEL OF AN AGGRAVATED SECOND DEGREE FELONY IS IMPOSED ON THE DEFENDANT.

Like its antecedent, *Morissette v. United States*, 342 U.S. 246, 72 S.Ct. 240 (1952), this case "would have remained a profoundly insignificant case to all except its

immediate parties had it not been so tried . . . as to raise questions both fundamental and far-reaching in . . . criminal law." *Id.* at 247.

This Court should allow this writ because the State of Ohio has created a new felony by sleight of hand rather than openly, in order to avoid affording Constitutional rights of due process of law[1] to defendants under Sections 2109.50 to 2109.52 of the Ohio Revised Code. By so doing, the State has deprived OSB of property without due process of law.

A. Notwithstanding that the Ohio Supreme Court has required proof of culpable conduct or state of mind for a finding of "guilty" and conviction under the embezzlement/concealment statute, no such requisite proof was made in this case.

Ohio's highest court has held that, for a finding of "guilty" and a mandatory 10% penalty under these quasi-criminal statutes, "wrongful or criminal conduct on the part of the accused" must be proven. *In Re: Estate of Black*, 145 Ohio State 405, 62 N.E.2d 90 (1945) (syllabus 2 and p. 411). Accord, *Ukrainiec v. Batz*, 24 Ohio App.3d 200, 202, 493 N.E.2d 1368 (Sum. App. 1982). Ohio courts have repeatedly emphasized that a culpable mental state or knowingly wrongful conduct is required in order to sustain a conviction. *Id.*; *In Re: Leiby v. Cosgrove*, 157 Ohio St. 374, 105 N.E.2d 583 (1952); *Goodrich v. Anderson*, 136 Ohio St. 509, 26 N.E.2d 1016 (1940); *Stone v. Woods*, 110 Ohio App. 277, 167 N.E.2d 122 (Fr. App. 1959). The wording of the statute supports this requirement of *mens rea*: "concealed, embezzled, or conveyed away . . . " O.R.C. §2109.50. This statute is addressed to acts committed with

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[1] The Fourteenth Amendment to the United States Constitution provides in part "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . " App. 27.

scienter – not to negligent acts or breaches of contract. Further, the statute establishes the explicit right to a jury trial, which is necessary to determine intent. Intent is a question of fact which must be submitted to the jury. *Morissette, supra* at 274. Standard Ohio jury instructions require it. Ohio Jury Instructions 252.01; App. 35.

No Court found that OSB committed any knowingly wrongful conduct or possessed *mens rea*. In the Probate Court, the Administrator did no more than argue a breach of the depository contract between the decedent and OSB. Petitioner is aware of no Ohio case permitting conviction under the embezzlement/concealment statute merely for having been "in possession" of, or having "conveyed away," estate assets, without also requiring the additional proof of *scienter* or culpable conduct. The Administrator's use of words like "wrong" or "wrongful" does not cure this defect or show *scienter*.

B. The embezzlement/concealment statute imposes a mandatory 10% penalty on the accused, which in this case was at the level of an aggravated second degree felony.

In the present case, the Court imposed a mandatory 10% penalty on OSB in the amount of $5,583.38. App. 21. Under Ohio law, this amount exceeds the maximum fine which may be imposed on an individual for an aggravated third degree felony ($5,000), but is within the maximum which may be imposed for an aggravated second degree felony ($7,500). Ohio Revised Code Sections 2929.11(C), (2), (3); App. 33. Under Ohio law, second degree felonies include such specific intent crimes as kidnapping, robbery, theft of property valued at more than $1,000, and felonious assault. Ohio Revised Code Sections 2905.01, 2911.02, 2913.02, and 2903.11.

Not only does the amount of the penalty indicate that it constitutes punishment for a felony – despite its "quasi-criminal" characterization – but so does its mandatory nature:

> "The distinction between refusing to do an act commanded, – remedied by imprisonment until the party performs the required act; and doing an act forbidden, – punished by imprisonment for a definite term; is sound in principle, and generally, if not universally, affords a test by which to determine the character of the punishment." *Gompers*, 221 U.S., at 443. In the former instance, the conditional nature of the punishment renders the relief civil in nature because the contemnor "can end the sentence and discharge himself at any moment by doing what he had previously refused to do." *Id.*, at 442. In the latter instance, the unconditional nature of the punishment renders the relief criminal in nature because the relief "cannot undo or remedy what has been done nor afford any compensation" and the contemnor "cannot shorten the term by promising not to repeat the offense." *Ibid.*
>
> The distinction between relief that is civil in nature and relief that is criminal in nature has been repeated and followed in many cases. An unconditional penalty is criminal in nature because it is "solely and exclusively punitive in character." *Penfield Co. v. SEC*, 330 U.S. 585, 593 (1947). A conditional penalty, by contrast, is civil because it is specifically designed to compel the doing of some act.
>
> *Hicks v. Feiock*, 485 U.S. 624, 632-33, 108 S.Ct. 1423 (1988)

In the present case, the 10% penalty was unconditional, solely punitive in character, and therefore criminal. *Id.* In this case, as in *Hicks*, the "purposes underlying the proceeding were wholly ambiguous." *Id.*, 425 U.S. at 638. This Court rejected the State's self-serving conclusion in

Hicks that the proceeding was "quasi-criminal," and should do so here as well. The proceeding was criminal, and OSB was entitled to due process of law. Here, as in *Hicks*, the Court was not attempting to encourage compliance with a statute or court order, but simply to punish.

Further, Ohio Revised Code Section 2109.50 recognizes the criminal nature of an embezzlement/concealment proceeding: "The officer to whom such process is delivered shall be liable for negligence in its service or return in like manner as sheriffs are liable in serving or returning a capias *issued upon an indictment.*" (Emphasis supplied). App. 30.

In short, the State of Ohio has treated as a felony the violation of Sections 2109.50 to 2109.52 of the Ohio Revised Code. The State has required proof of wrongful or criminal conduct by the accused, a conviction of "guilty," and a mandatory penalty – in this case, at the level of a second degree felony. This Court should determine that the Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibits a State from convicting an accused of an act which, in degrees of both willful wrongdoing and of punishment, amounts to a felony, without proving the requisite *scienter* element of a felony.

C. This Court has repeatedly reversed criminal convictions obtained without mens rea.

The issue of when an accused may be convicted of a felony, in the absence of a culpable mental state and knowingly wrongful conduct, has troubled this Court and others:

> This case stirs large questions – questions that go to the moral foundations of the criminal law. Whether postulated as a problem of *"mens rea,"* of "willfulness," of "criminal responsibility," or of *"scienter,"* the infliction of criminal punishment upon the unaware has long troubled the fair administration of justice.

> *United States v. International Minerals & Chem Corp.*, 402 U.S. 558, 565, 91 S.Ct. 1697 (1971) (dissent)

See also *United States v. United States Gypsum*, 438 U.S. 422, 435, 437, 98 S.Ct. 2864 (1978) (intent required for criminal antitrust conviction).

In *Morissette, supra*, the accused was hunting for deer on a government bombing range and found some discarded shell casings. He thought they had been abandoned. He hauled them away, and earned $87.00 by selling them for scrap metal. The trial court instructed the jury that the government did not have to prove criminal intent in order to obtain a conviction; the fact of taking the government's metal with a value of more than $.01 which was on government property would suffice. The Court of Appeals affirmed the conviction.

This Court reversed. Justice Jackson, writing for the Court, was troubled by the concept of a criminal conviction without *scienter*:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to," and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution.
>
> *Id.*, 342 U.S. at 250-251

Justice Jackson explained:

> The unanimity with which they [courts] have adhered to the central thought that wrongdoing

> must be conscious to be criminal is emphasized by the variety, disparity and confusion of their definitions of the requisite but elusive mental element. However, courts of various jurisdictions, and for the purposes of different offenses, have devised working formulae, if not scientific ones, for the instruction of juries around such terms as "felonious intent," "criminal intent," "malice aforethought," "guilty knowledge," "fraudulent intent," "wilfulness," "*scienter*," to denote guilty knowledge, or "*mens rea*," to signify an evil purpose or mental culpability. By use or combination of these various tokens, they have sought to protect those who were not blameworthy in mind from conviction of infamous common-law crimes.
>
> *Id.*, 342 U.S. at 252.

Justice Jackson proceeded to recognize that certain crimes were so socially devastating as to permit a criminal conviction without *scienter*, especially when the penalty was slight. He explained the rationale for conviction and punishment in these narrowly defined situations:

> Many violations of such regulations result in no direct or immediate injury to person or property but merely create the danger or probability of it which the law seeks to minimize. While such offenses do not threaten the security of the state in the manner of treason, they may be regarded as offenses against its authority, for their occurrence impairs the efficiency of controls deemed essential to the social order as presently constituted. In this respect, whatever the intent of the violator, the injury is the same, and the consequences are injurious or not according to fortuity. Hence, legislation applicable to such offenses, as a matter of policy, does not specify intent as a necessary element. The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society

> might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities. Also, penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation. Under such considerations, courts have turned to construing statutes and regulations which make no mention of intent as dispensing with it and holding that the guilty act alone makes out the crime. This has not, however, been without expressions of misgiving.
>
> *Id.*, 342 U.S. at 256

This Court proceeded to reverse the conviction, holding that proof of intent was required, and that intent was always a jury question. *Id.*, 342 U.S. at 273-274, 276. Accord, *Liparota v. United States*, 471 U.S. 419, 105 S.Ct. 2084 (1985) (illegal purchase of food stamps; criminal offenses without *mens rea* have "disfavored status"); *Kilbourne v. State*, 84 Ohio St. 247, 95 N.E. 824 (1911) (conviction for possession of stolen metals, without *scienter*, is unconstitutional); *Anderson v. State of Ohio*, 7 Ohio 250 (1836); *City of Campbellsburg v. Odewalt*, 72 S.W. 314 (Ky. 1903) (mere ownership of premises on which liquor was served, held insufficient to support criminal conviction based on such ownership, absent *mens rea*).

OSB, like Morissette, had no criminal intent. OSB disbursed $55,000 from the decedent's account upon an established Probate attorney's fraudulent request therefor, supported by forged Court and Estate Tax documents. OSB's act was "wrong" only in the sense that it was mistaken – just as Morissette's retrieval of discarded, rusted shell casings was "wrong" because he was mistaken as to whether they had been abandoned and whether he had a right to collect them. But OSB did not have a "wrongful" intent any more than Morissette. In fact, prior to OSB's conviction, the State of Ohio had judicially determined that Attorney Hamann possessed

the "wrongful" intent because it convicted him of multiple related felonies, *Hamann, supra,* and because the Probate Court separately convicted him of embezzling, concealing and conveying away under the embezzlement/concealment statute, four (4) months prior to OSB's conviction. In short, it is clear beyond any doubt that OSB lacked *scienter* and committed no "wrongful or criminal conduct." *Black, supra.* And, OSB was convicted and fined at the level of a second degree felony – like Morissette, without the prerequisite specific intent. Significantly, the Probate Court itself knew more about Mr. Hamann than did OSB, having dealt with him and having repeatedly appointed him as a fiduciary for many years.

In civil actions as well, this Court has held that the imposition of a substantial fine upon a party that did not knowingly commit any wrongful conduct constituted the taking of property without due process of law, in violation of the Constitution. In *Southwestern Tel. Co. v. Danahar,* 238 U.S. 482, 35 S.Ct. 886 (1915), a customer attempted to recover from a telephone company the penalty of $100 a day for sixty-three (63) days for alleged discrimination against the customer in not providing telephone service. The trial court instructed the jury that, if the company had refused to serve the customer because she had not paid a prior debt to the company, then the jury must find for her. A $6,300 verdict for the customer was affirmed by the Supreme Court of Arkansas.

This Court reversed. This Court found that the company was acting in accordance with its own rules and regulations, which had been adopted in good faith and were in effect at the time of the allegedly wrongful acts. This Court held:

> There was no intentional wrongdoing; no departure from any prescribed or known standard of action, and no reckless conduct. Some regulation establishing a mode of inducing prompt payment of the monthly rentals was necessary. It is not as if the company had been free to act or

> not as it chose. It was engaged in a public service which could not be neglected. The protection of its revenues and justice to its paying patrons required that something be done. It acted by adopting the regulation and then impartially enforcing it. There was no mode of judicially testing the regulation's reasonableness in advance of acting under it, and, as we have see, it had the support of repeated adjudications in other jurisdictions. In these circumstances to inflict upon the company penalties aggregating $6,300 was so plainly arbitrary and oppressive as to be nothing short of a taking of its property without due process of law.
>
> *Id.*, 238 U.S. at 490-491.

In the present case, as in *Danahar*, OSB was acting in accordance with established procedures and in good faith, but was duped by a criminal. Does this permit the imposition of a $5,500 fine without consideration of intent or absence of wrongful conduct?

In *Missouri Pacific Ry. v. Tucker*, 230 U.S. 340, 33 S.Ct. 961 (1913) this Court considered a $500 liquidated damage provision in a Kansas law for a carrier's demanding or receiving rates in excess of those prescribed by that State. The railroad had transported twenty-five (25) barrels of fuel oil approximately three hundred (300) miles, and should have charged $12.00. Instead, it charged $15.02. Because of the $3.02 overcharge, the consignee brought an action for $500 as liquidated damages, recovered, and his judgment was affirmed by the Kansas Supreme Court. This Court reversed:

> As applied to cases like the present the imposition of $500 as liquidated damages is not only grossly out of proportion to the possible actual damages but is so arbitrary and oppressive that its enforcement would be nothing short of the taking of property without due process of law

> and therefore in contravention of the Fourteenth Amendment.
>
> *Id.*, 230 U.S. at 351.

In the present case, the ten percent (10%) penalty of $5,500 has nothing to do with the Estate's actual damages. In fact, once the Estate recovers its actual damages, plus costs and interest, it will be made whole. The ten percent (10%) penalty was designed as punishment for misconduct, and it is simply "arbitrary and oppressive" here, since it was imposed without any regard for OSB's *mens rea* or culpable conduct.

Respondent may assert that a violation of Section 2109.52 of the Ohio Revised Code does not constitute a felony or any other crime, and that the Ohio Supreme Court has termed a violation of the statute a "quasi-criminal" offense. However, this Court's inquiry should instead address the substance of the offense, and the mandatory nature of the punishment, rather than the State's terminology.

> Of course the Legislature cannot by a mere change of name or of form convert that which is in its nature a prosecution for a crime into a civil proceeding and thus deprive parties of their rights to a trial by jury. The Constitution cannot thus be trifled with. *Stockbridge v. Mixer*, 215 Mass. 415, 102 N.E. 646.
>
> *Ashley v. Wait*, 228 Mass. 63, 116 N.E. 961, 966 (Mass. 1917), *dism.* 250 U.S. 652 (1919)

This Court has held:

> " . . . the labels affixed either to the proceeding or to the relief imposed under state law are not controlling and will not be allowed to defeat the applicable protections of federal constitutional law. . . . This is particularly so in the codified laws of contempt where the "civil" and

> "criminal" labels of the law have become increasingly blurred."
>
> *Hicks*, 485 U.S. at 631.

In short, as the Court held in *Hicks*, the State's term "quasi-criminal" does not end the Constitutional inquiry. If an unconditional, substantial penalty is imposed, as it was here, then the proceeding is criminal, and due process safeguards attach.

Further, unlike the strict liability offenses referenced in *Morissette, supra*, the violation of Section 2109.52 of the Ohio Revised Code is not a strict liability offense. Wrongful or criminal conduct must be shown. *Black, supra; Ukrainiec, supra;* Ohio Jury Instruction 252.01, App. 35. There is also no dispute that the penalty exacted, after a finding of "guilty" and a conviction, was at the level of a second degree felony. Ohio Revised Code Section 2929.11(C). In short, all the elements of a felony are present: *mens rea*, wrongful conduct, a finding of guilt, and a mandatory felony-level fine. A State should not be permitted to deprive an accused of Constitutional rights by calling a felony "quasi-criminal," and then prosecuting the accused without proving *all* elements of the offense – including *scienter* – in violation of the Due Process Clause of the United States Constitution.

If Ohio's practice is to be sustained, then it would permit the following types of absurd – and Constitutionally repugnant – situations:

1. If the situation had been the same in this case, but the dishonest attorney had stolen $10 million instead of $55,000, OSB would have faced a mandatory one million dollar ($1 million) fine. How large must the automatic fine be before a defendant is deprived of property without due process in violation of the Constitution?

2. The owner of a building is unaware that a person in his building illegally sold liquor on the premises. The owner is convicted for violating a statute that penalizes the owner when

> such sale occurs, regardless of the owner's knowledge of the sale. *Odewalt, supra.* (" . . . the ordinance in question in effect makes one guilty of the wrongful act of another. Our opinion is that the ordinance in question is unconstitutional." *Id.*, 72 S.W. at 315).

This Court and others have been extremely reluctant to impose criminal penalties on an accused without *mens rea*. See *International Minerals & Chem. Corp., United States Gypsum, Morissette, Liparota,* all *supra; U.S. v. Garcia,* 751 F.2d 1033 (9th Cir. 1985) (*scienter* required for conviction of willfully misapplying funds under Comprehensive Employment and Training Act, 29 U.S.C. §801-999). Further, when a litigant seeks a penalty under a civil statute, requiring proof of *mens rea,* then the litigant must plead and prove this mental state. *Grant Brothers Construction Company v. United States,* 232 U.S. 647, 661, 34 S.Ct. 452 (1914) ("Knowledge being an element of what is penalized, it must be included in the statement of the cause of action for the penalty.").

In conclusion, the Ohio Supreme Court has required proof of knowingly wrongful conduct or *mens rea* in order to convict a defendant under the embezzlement/concealment statute. Upon conviction, that statute imposed a felony-level punishment on OSB. Yet, OSB was convicted without any proof that it committed knowingly wrongful conduct or possessed *mens rea,* and OSB was fined at the level of a felony. A conviction that is not based on any willful wrongdoing or scienter, and which carries with it the consequences of a serious felony, violates a defendant's right to due process of law under the Fourteenth Amendment to the U.S. Constitution. This Court should reverse the conviction.

II. THE DENIAL OF A JURY TRIAL DEPRIVED OHIO SAVINGS BANK OF DUE PROCESS OF LAW IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

The trial court's refusal to honor OSB's demand for a jury trial – made in compliance with both Ohio Revised Code Section 2109.52 which specifically required a jury trial upon demand, and with Ohio Revised Code Section 2945.17 – violated two (2) important Constitutional rights protected by the Fourteenth Amendment to the United States Constitution.

A. The State deprived OSB of property without due process.

Sections 2109.50 to 2109.52 of the Ohio Revised Code are summary proceedings, inquisitorial in nature. *Leiby, supra* (syllabus 1). If the Ohio General Assembly had decided to limit these proceedings to summary inquiries based upon pleadings and non-jury proceedings, it could have done so. But it did not. It specifically recognized that, because *mens rea* could be an issue, *Black, supra,* a jury trial was a necessary right, and statutorily accorded this right to all litigants: " . . . the probate court shall determine, by the verdict of a jury if either party requires it or without it if not required, whether the person accused is guilty . . . " Ohio Revised Code Section 2109.52. The State, having given OSB this statutory right, cannot simply take it away and pretend that it does not exist, in order to deprive OSB of its property through a money judgment and statutory penalty. This right is particularly important here, where the Probate Court's own processes, and its desire to avoid further embarrassment in the news media, affected the proceedings and the neutrality of the finder of fact.

Moreover, in Section 2945.17 of the Revised Code, the State accorded all accuseds the right to a jury trial when the penalty for violation of the statute exceeds $100. This

case does involve the alleged violation of a statute and a fine fifty-five (55) times the minimum statutory amount. The result in this case is a dangerous one: Ohio courts could deprive accuseds of property by convicting them of violations of various statutes carrying fines greater than $100 upon affidavits alone, as was done in this case. This is an invitation to Star Chamber tactics and the stripping away of a precious safeguard against oppression: trial by jury. In this case, the Probate Court was deeply embarrassed because one of its longstanding practitioners had committed a massive and widely reported fraud. If ever a jury trial was needed to protect a defendant from oppression, it was here.

The present case differs from most Federal and State civil cases, in which jury trial is generally preserved as to "any issue triable of right." F.R. Civ.P. 38(b); Ohio R. Civ.P. 38(B). In such cases, courts consider what issues are triable of right to a jury and which ones are not because they are equitable in nature, or are amenable to summary judgment. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505 (1986); *Celotex v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986). This case does not involve Rule 38 or a generalized right to jury trial, subject to established limitations. Instead, this case involves two separate *statutes* granting OSB the *unqualified* right to a jury trial before OSB can be deprived of its property. Neither of these statutes limits this right by the words "triable of right," or subjects the right to Rule 38 or the discretion of the court. In short, even if there were no disputed facts, OSB had the unqualified right to a jury trial under Sections 2109.52 and 2945.17 of the Ohio Revised Code before it could be deprived of its property under the embezzlement/concealment statute. The State took this right away as if it were a trifling matter. See *Goldberg v. Kelley*, 397 U.S. 254, 269, 90 S.Ct. 1011 (1970) ("In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses"); *Morissette, supra*, 342 U.S. at 274 ("Where intent of the accused is an ingredient

of the crime charged, its existence is a question of fact which must be submitted to the jury. State court authorities cited to the effect that intent is relevant in larcenous crimes are equally emphatic and uniform that it is a jury issue.").

Likewise, Ohio's General Assembly intended that before an accused is deprived of a substantial property interest through a statutory penalty of $100 or more, the accused must be given a trial by jury. Ohio Revised Code Section 2945.17. This is a time-honored safeguard against arbitrary judicial decisions and punishment.

In short, when the State protects fundamental property rights by establishing the specific right to a jury trial by two (2) separate statutes, without qualification or exception, and when the State denies such trial in order summarily to deprive the defendant of its property through a judgment and penalty, then the State has deprived the defendant of property without due process of law in violation of the Fourteenth Amendment to the U.S. Constitution.

B. The State deprived OSB of its Sixth Amendment right to a jury trial.

Since OSB was convicted of what amounts to a felony (even though called "quasi-criminal"), OSB was entitled to a jury trial under the Sixth Amendment to the U.S. Constitution as made applicable to Ohio by the Fourteenth Amendment's Due Process Clause. *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct 1444 (1968); *Bloom v. State of Illinois*, 391 U.S. 194, 88 S.Ct. 1477 (1968).

This Court has held that a jury trial is required for a serious offense but not for a petty one:

> Of course the boundaries of the petty offense category have always been ill-defined, if not ambulatory. In the absence of an explicit constitutional provision, the definitional task necessarily falls on the courts, which must either pass

> upon the validity of legislative attempts to identify those petty offenses which are exempt from jury trial or, where the legislature has not addressed itself to the problem, themselves face the question in the first instance. In either case it is necessary to draw a line in the spectrum of crime, separating petty from serious infractions. This process, although essential, cannot be wholly satisfactory, for it requires attaching different consequences to events which, when they lie near the line, differ very little.
>
> *Duncan, supra,* 391 U.S. at 160-61

While OSB did not risk incarceration for violation of the Ohio embezzlement/concealment statute, such a conviction certainly hurt its good name, and a $5,500 fine is substantial. Furthermore, the unconditional nature of the fine showed that it was criminal in nature. *Hicks, supra.*

In *Bloom v. State of Illinois*, 391 U.S. 194, 88 S.Ct. 1477 (1968), a person was sentenced to twenty-four (24) months imprisonment for criminal contempt. His offense: willfully petitioning a probate court to admit a falsely prepared and executed will. The trial court summarily convicted him, despite his demand for a jury trial. This Court reversed, holding that contempt proceedings were in substance criminal and serious in nature, requiring a jury trial even though contempt was not technically defined as a felony, or any other crime. The same principle should apply here, particularly since the Court here as in *Bloom* risked being less than impartial due to its peculiar involvement in the proceedings:

> When a serious contempt is at issue, considerations of efficiency must give way to the more fundamental interest of ensuring the even-handed exercise of judicial power. In isolated instances recalcitrant or irrational juries may acquit rather than apply the law to the case before them. Our system has wrestled with this problem for hundreds of years, however, and

> important safeguards have been devised to minimize miscarriages of justice through the malfunctioning of the jury system. Perhaps to some extent we sacrifice efficiency, expedition, and economy, but the choice in favor of jury trial has been made, and retained, in the Constitution. We see no sound reason in logic or policy not to apply it in the area of criminal contempt.
>
> *Id.*, 391 U.S. at 209

More recently, in *U.S. v. Halper*, 490 U.S. 435, 109 S.Ct. 1892 (1989), this Court examined when a penalty, civil on its face, constituted a criminal punishment and therefore required that the accused be given Constitutional protections:

> In making this assessment, the labels "criminal" and "civil" are not of paramount importance. . . .
>
> Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment.
>
> *Id.*, 490 U.S. at 447, 448

This Court concluded:

> From these premises, it follows that a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.
>
> *Id.*, at 448.

See also *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 165, 83 Ct. 554 (1963) (deprivation of citizenship is serious and punitive, and requires that the accused be afforded Sixth Amendment rights).

In the present case, the 10% penalty imposed on OSB served no remedial purpose whatsoever. It constituted automatic, mindless, mandatory punishment following a

conviction and a finding of "guilty" under the embezzlement/concealment statute.

In *People v. Elmore*, 256 N.Y. 489, 177 N.E. 14 (N.Y. 1931), the New York Court of Appeals affirmed the reversal of a $300 penalty imposed upon the owner of a brothel in the same non-jury proceeding in which the court had ordered the premises closed. New York's highest court affirmed the intermediate appellate court's reversal of the monetary penalty because a court of equity imposed the penalty without a trial:

> It is in effect a penalty for an offense, and its proceeds are treated in the same way as a fine . . . . That part of the statute violates a right to trial by jury which the Constitution has declared shall remain inviolate. We look behind the form to the substance.
>
> *Id.*, 177 N.E. at 17.

Petitioner respectfully submits that haling a respected financial institution into court in a quasi-criminal proceeding, finding it "guilty" (which imports *mens rea* or knowingly wrongful conduct), and imposing a felony-level fine of $5,500 gravely besmirches the institution's good name, causing as much as bad publicity and taint as a felony conviction. Even though the State of Ohio has not termed the violation of the embezzlement/concealment statute a felony, the State has treated it as such. Therefore, OSB should have been entitled to a jury trial. Indeed, OSB was statutorily entitled to a jury trial for the violation of any statute carrying a fine of more than $100 and this right was summarily withdrawn. Ohio Revised Code Section 2945.17. The Probate Court's attempt to minimize its own embarrassment, and to victimize OSB in order to further its own agenda, violated the Constitution.

In *Baker v. City of Fairbanks*, 471 P.2d 386 (Alaska 1970), the Alaska Supreme Court held that, under that State's Constitution, all "criminal" defendants are entitled to a jury trial, except "innocuous" violators such as

persons accused of parking violations, minor traffic offenses, etc. *Id.* at 402. The court specifically stated that:

> A heavy enough fine might also indicate criminality because it can be taken as a gauge of the ethical and social judgments of the community.
>
> *Id.*, 471 P.2d at 402, n.29

While that Court was construing the jury trial guarantees of the Alaska Constitution, the factors it considered are applicable here: the level of punishment and the degree of opprobrium that a conviction carries. *Id.* at 389. This Court need not extend the Constitutional jury trial right as far as *Baker*, which involved an assault punishable by 2 months imprisonment and a $600 fine. Here, a mandatory felony-level punishment was imposed, and OSB's good name was injured. The Sixth Amendment's guarantee to trial by jury should extend to this case.

CONCLUSION

The conviction of the victim of a crime, based on a quasi-criminal statute carrying a felony-level punishment, without *mens rea* or knowingly wrongful conduct by the victim, violates the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. The States should not be free to obtain criminal penalties without affording due process of law, by defining what is in substance a criminal offense as something else. The State's casual use of definition in order to obtain a serious conviction of a non-culpable defendant is reminiscent of Alice in Wonderland:

> "When *I* use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean – neither more nor less."
>
> "The question is," said Alice, "whether you *can* make words mean so many different things."
>
> "The question is," said Humpty Dumpty, "which is to be master – that's all."
>
> Lewis Carroll, *Through the Looking Glass*, Ch. 6

Furthermore, when a penal statute specifically establishes an accused's right to jury trial, and a separate statute grants a jury trial for violation of any statute carrying a penalty in excess of $100, the State's summary deprivation of a jury trial in order to impose a mandatory $5,500 penalty offends the Sixth and Fourteenth Amendments to the U.S. Constitution for the reasons set forth herein.

Therefore, Petitioner respectfully requests this Court to grant certiorari and hold that in these circumstances the conviction of OSB without *mens rea* or culpable conduct, and without providing a jury trial, violated the Sixth and Fourteenth Amendments to the U.S. Constitution.

Respectfully submitted,

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The Supreme Court of Ohio

1994 TERM

To Wit: September 21, 1994

In re: Estate of Joan Popp, Appellee.	:	Case No. 94-1253
[Appeal by Ohio Savings Bank, Appellant.]	:	ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

COSTS:

Docket Fee, $40.00, paid by Ohio Savings Bank.

(Cuyahoga County Court of Appeals; No. 64718)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 64718

IN RE: ESTATE OF JOAN POPP Plaintiff-Appellee [APPEAL BY OHIO SAVINGS BANK, Defendant-Appellant]	:	JOURNAL ENTRY and OPINION

DATE OF ANNOUNCEMENT
OF DECISION: MARCH 31, 1994

CHARACTER OF PROCEEDING:
Civil Appeal from the Probate Court Division of the Common Pleas Court Case No. 1057643

JUDGMENT: Affirmed.

DATE OF JOURNALIZATION:
Apr. 18, 1994

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HARPER, J.:

Appellant, Ohio Savings Bank (the Bank) appeals from the summary judgment granted by the Cuyahoga County Court of Common Pleas, Probate Division. For the reasons below, we affirm.

I.

Joan Popp died intestate on January 31, 1991, in Cuyahoga County, Ohio. At the time of Joan Popp's death, she had a deposit of $55,505.13 in her savings account with the Bank. On February 13, 1991, less than one month after Joan Popp's death, William Hamann, Jr. presented to the Bank forged tax releases and forged letters of administration, and subsequently was issued a check by the Bank in the amount of $55,833.81 from the savings account of Joan Popp. William Hamann Jr. represented himself to the Bank as the administrator of the estate of Joan Popp. At the time of the withdrawals, February 13, 1991, no fiduciary had been appointed by the probate court with respect to the decedent's estate.

On June 6, 1991, Alan Gelbman was appointed by the probate court as the administrator of the Estate of Joan Popp.

At the criminal trial of William Hamann, Jr. in the Cuyahoga County Court of Common pleas, he was convicted of forgery, uttering, and theft from the estate of Joan Popp.

On July 23, 1991, Alan Gelbman, the administrator of the Estate of Joan Popp, filed a complaint in the probate court against Hamann and the Bank for Concealment and

Embezzlement. On November 22, 1991, the administrator filed an amended complaint for concealment, embezzlement, and conveying assets against the Bank, Marvin Schatz, Cuyahoga Savings Bank, First Federal Savings Bank, Third Federal Savings and Loan Association of Cleveland, Cardinal Savings Bank and TransOhio Savings Bank. The claim against the other defendants named above have either been dismissed, settled out of court or are pending on issues which are undisturbed by this appeal.

II.

After the trial court's grant of summary judgment in favor of appellee, the Estate of Joan Popp, this appeal follows, with appellant filing the following errors for our review:

> "I. The Probate Court erred in denying OSB's Motion to Dismiss and/or For Summary Judgment because; (1) it lacked subject matter jurisdiction over an O.R.C. §2109.50 complaint against a financial institution when the complaint was based on withdrawal of funds pursuant to forged Probate Court and Estate Tax documents, (b) OSB lacked the requisite *scienter* to be convicted under such statute, and (c) the relationship between the parties was that of debtor and creditor.
>
> "A. The Probate Court lacked subject matter jurisdiction.
>
> "B. Even if the Probate Court possessed jurisdiction, summary judgment

should have been entered in OSB's favor because it did not act with *scienter.*

"C. The administrator cannot properly use O.R.C. §2109.50 as a collection device in the context of a debtor-creditor relationship.

"D. The Administrator has failed to meet his burden under Civil Rule 56.

"II. The Probate Court erred in granting the Administrator's Motion for Summary Judgment because: (a) the Administrator was not entitled to judgment as a matter of law, (b) the statute does not permit conviction upon summary judgment, (c) the materials attached to the Administrator's motion were insufficient Civil Rules 56(C) and (E), (d) there were genuine issues of material fact, and (e) the Administrator was collaterally estopped from pursuing the claim.

"A. As a matter of law, the Administrator's summary judgment motion should have been overruled.

"B. O.R.C. §§2109.50 *et seq.* area a [*sic*] quasi-criminal statutes, require a jury trial by their terms, and do not permit 'conviction by summary judgment.'

"C. The materials attached to the Administrator's motion were insufficient under Civil Rules 56(C) and (E).

"D. Genuine issues of material fact precluded summary judgment for the Administrator.

"E. The Administrator is collaterally estopped from pursuing his claim herein.

"III. The Probate Court erred in overruling OSB's Motion to Dismiss for insufficiency of service of process.

"IV. The Probate Court's denial of OSB's Motion to Dismiss and/or For Summary Judgment, and its grant of the Administrator's Motion for Summary Judgment, permitted OSB to be convicted of a quasi-criminal offense without the requisite *scienter,* in violation of the United States and Ohio Constitutions.

"V. The Probate Court erred in denying OSB's Constitutional and statutory rights to a speedy trial and to a jury trial.

"VI. The Probate Court erred in denying OSB any discovery.

"VII. The Probate Court erred in failing to rule on OSB's Motion to Certify.

"VIII. The Probate Court erred in denying OSB leave to file its complaint or cross-claim against other defendants."

As a preliminary issue, we note that Wendy Hoyt and Gale Van Huysen filed a brief as substitute appellees in the within case in disregard of this court's decision denying such request. See journal entry dated 6/21/93. In light of our denial of Hoyt's and Van Hysen's [sic] motion to substitute for the estate of Joan Popp as appellees in this action, the brief of Hoyt and Van Huysen is of no

force and effect in this case and the same is stricken from the record.

III.

Appellant argues in its first assignment of error that the trial court erred by denying its motion to dismiss for lack of subject matter jurisdiction. Appellant argues that since appellee's action was based upon a debtor/creditor relationship, R.C. 2109.50 does not apply. Appellant's argument has no merit.

R.C. 2109.50 states in pertinent part as follows:

> "Upon complaint made to the probate court of the county having jurisdiction of the administration of the trust estate or of the county wherein a person resides against whom the complaint is made, by a person interested in such trust estate or by the creditor of a person interested in such trust estate against any person suspected of having concealed, embezzled, or conveyed away or of being or having been in the possession of any moneys, chattels, or choses in action of such estate, said court shall by citation, attachment or warrant, or if circumstances require it, by warrant or attachment in the first instance, compel the person or persons so suspected to forthwith appear before it to be examined, on oath, touching the matter of the complaint."

One of the elements of filing a complaint under R.C. 2109.50 is that a defendant is suspected of conveying away or of being or having been in possession of any moneys, chattels or choses in action of an estate. In the within action appellant is alleged to have conveyed away

a certain sum of money belonging to the estate of Joan Popp, which were deposits made by Joan Popp (deceased) during her lifetime, to an unauthorized recipient. Certainly a financial institution which conveys out money in its possession to an authorized individual without the consent of the deceased or his estate comes within the provisions of R.C. 2109.50 *et seq.* See *Fecteau v. Cleveland Trust Co.* (1960), 171 Ohio St. 121, 167 N.E.2d 890. Since appellee's complaint involves wrongful or culpable conduct on the part of appellant, see *In Re Estate of Black* (1945), 145 Ohio St. 405, 411; *In Re Estate of Fred Cyrran* (Nov. 25, 1985), Stark County App. No. CA-6720, unreported, jurisdiction is appropriate in the probate court. *In Re Brooks* (1949), 56 Ohio Law Abs. 15. Unlike appellant, we understand this case to be an action for wrongful conveyance and not possession, therefore, neither *in Re Liby* [sic] *v. Cosgrove* (1952), 157 Ohio St. 374, nor *Goodrich v. Anderson* (1940), 136 Ohio St. 509, is applicable.

Appellant further argues that summary judgment should have been entered in its favor because the trial court did not find that it acted with scienter. Appellant cites *Ukrainiec v. Batz* (1982), 24 Ohio App.3d 200, for the proposition that scienter is an element that must be shown to get a conviction under R.C. 2109.50. We disagree. The *Batz* case is distinguishable from the instant case for the following reasons: the *Batz* court did not find any concealment but rather found that Mary Batz was merely in possession of the estate assets, *id.* at 202, a big difference in statutory interpretation of R.C. 2109.50. The court also found that Ms. Batz's father intended to give his daughter an interest in the assets she had in her possession, indicating no act of concealment on her part.

In the instant case, the Bank intended to convey the money and did convey the money albeit to a wrong party. A complaint filed under R.C. 2109.50, although quasi-criminal in character, is controlled by the laws governing civil proceedings in the probate court. *In Re Howard* (1947), 79 Ohio App. 203, 72 N.E.2d 502. So the strict invocation of the rules of criminal procedure underscores the very intent of the legislature in enacting R.C. 2109.50, which is to provide a summary means, inquisitorial in nature to recover specific property or the proceeds or value thereof belonging to an estate. *In Re Black, supra; Goodrich v. Anderson, supra.* Thus in a proceeding against a financial institution under R.C. 2109.50 for wrongful conveyance, it must first be established that there was a conveyance, made to a wrong party, after which, all that is required then is to show by a preponderance of evidence that the money belonged to the decedent; it is not necessary to establish that the conveyance was made with a fraudulent or criminal intent. See *Lindquist v. Hayes* (1926), 22 Ohio App. 141, 153 N.E. 297. In the instant case, we have no doubt that all the elements of wrongful conveyance have been established as appellant has not denied conveyance of the deceased [sic] money to Hamann. Accord *Leonard v. State ex rel. Scott* (1914), 3 Ohio App. 313.

Appellant argues further that:

> "As shown by Ms. Lucyk's affidavit and the Administrator's partial deposition, OSB was not 'aware that . . . (its) conduct . . . will . . . probably be of a certain nature' when it released the funds to Hamann. OSB released these funds to Hamann under the good faith but mistaken

> belief that he was the authorized representative of the Popp Estate. OSB was duped by a clever forgery by an experienced attorney who had long been trusted by the Probate Court, and who has also been entrusted by the decedent's sister and by the attorney she retained, Mr. Schatz, with account papers, death certificate, and so forth. OSB did not therefore act knowingly. It was a victim, pure and simple. OSB lacked *scienter*, and the Administrator has never denied this."

We are no more persuaded by this argument than we are with the others before it. The law of commercial paper remains true today as it was before U.C.C. was codified. R.C. 1303.40 (U.C.C. 3-404) provides in pertinent part as follows:

> "(A) Any unauthorized signature is wholly inoperative as that of the person whose name is signed unless he ratifies it or is precluded from denying it; but it operates as the signature of the unauthorized signer in favor of any person who in good faith pays the instrument or takes it for value."

Unauthorized signature is defined in R.C. 1301.01 [U.C.C. 1-201] to include forgery and a signature made by an agent exceeding his actual or apparent authority. See official comments to R.C. 1303.40. The law is settled in Ohio that regardless of the custom among bankers as to the method of payments, where a bank relies upon false representations as to identity for which neither the drawer nor payee is responsible, it makes payment to a wrong person at its peril. *Dodge v. National Exch. Bank* (1876), 30 Ohio St. 1. So appellant's mistaken argument

notwithstanding, the evidence is undisputed that the conveyance made by appellant was as a result of forged instruments presented to it by Hamann. A forged instrument is not merely voidable, but absolutely void, and there can be no ratification of forgery, or a mistake by its acceptance that will make a forged instrument valid, as appellant would want us to believe. See *Shinew v. First Nat. Bank* (1911), 84 Ohio St. 297, 95 N.E. 881; *Workman v. Wright* (1878), 33 Ohio St. 405.

Unless there is any evidence in the instant case which can be interpreted as a direction by either the deceased or her estate to the bank to convey any money without reference to the genuineness of the endorsement, or prior course of dealing, between the deceased and the bank, warranting such payment, the Bank is liable if payment is made on an unauthorized endorsement. The Bank does not have to know that the instrument was forged or that the presenter has a criminal intent. See *Jones' Sons v. Peoples Bank* (1917), 95 Ohio St. 253, 116 N.E. 34.

Appellant's first assignment of error is overruled.

IV.

Appellant argues in its second assignment of error that summary judgment was improper because the statute does not permit conviction upon summary judgment. We note this argument to be inconsistent with appellant's other arguments that fault the trial court for not granting its motion for summary judgment. However, this inconsistency notwithstanding, we held *supra* that R.C. 2109.50 may be quasi-criminal in nature, but the rules of civil

procedure as practiced in the probate court are applicable. Summary judgment being one of the procedures obtained in the probate court in an adjudication of cases, may be used in a R.C. 2109.50 proceeding if all the elements apply. We hold as such because R.C. 2109.50 by its enactment is intended as a summary proceeding to recover judgment of money of a decedent alleged to be concealed, embezzled or conveyed away. Therefore, a requirement of all the niceties of a full criminal or civil proceeding would be inapposite of the legislative intent. See *Jones v. Neu* (1958), 106 Ohio App. 161, 150 N.E.2d 858 (where the court held evidence against impeachment of a party's own witness inapplicable). See also *Goodrich v. Anderson, supra; In Re Howard, supra; Stone v. Woods* (1959), 110 Ohio App. 277, 167 N.E.2d 122 (where the court held, any issue outside the statute should be relegated to a civil action with appropriate pleading). See also *In Re Jones* (1952), 68 Ohio Law Abs. 282, 122 N.E.2d 111. Since it is a special proceeding that does not require a jail sentence but only a recovery of the assets or their values and a 10% fine when applicable, see *Eger v. Eger* (1974), 39 Ohio App.2d 14, 314 N.E.2d 394, summary judgment may be granted by the court.

> "Summary judgment is a potentially useful, but extraordinary, procedure wherein the trial of issues of fact made up by the pleadings is avoided. Because summary judgment represents a shortcut through the normal litigation process by avoiding a trial, the burden is strictly upon the moving party to establish, through the evidentiary material permitted by the rule, that there is no genuine issue of material fact and

that he is entitled to judgment as a matter of law. Civ.R. 56(C)."

AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp. (1990), 50 Ohio St.3d 157.

In the instant case, appellant has never denied conveying money belonging to the estate to a wrong party. Its argument is a defense of mistake which we have stated does not absolve it from liability. Therefore, since there remains no genuine issue of fact to go to the trier of fact, summary judgment is appropriate. See *Mitseff v. Wheeler* (1988), 38 Ohio St.2d 112.

Appellant argues that there is a genuine issue of fact as to whether the decedent herself conveyed away its certificates of deposit to Hamann. Appellant has continually argued that it is an innocent party who was duped by Hamann and has consistently acknowledged that Hamann forged the endorsements he used in obtaining funds from the Bank. We therefore, find the argument of a possible conveyance by the decedent to the forger inconsistent with the acknowledgments already made by appellant that Hamann obtained the funds by fraudulent means.

Appellant further argues that appellee was estopped because its action in fraud against Cardinal Federal Savings Bank was dismissed by the court for lack of subject matter jurisdiction. This is not an action for fraud and estoppel is not applicable. However, appellant is not Cardinal Federal Savings Bank nor is there any evidence that it is in privy with Cardinal Federal Savings Bank.

Appellant's second assignment of error is overruled.

V.

Appellant argues in its third assignment of error that service of process was defective. It argues that the complaint was left at a receptionist's desk at the Bank but was never handed to Mr. Robert Goldberg, the Bank's chief executive officer whom the summons was addressed to in person. The law in the state of Ohio remains that service is proper in cases where the civil rules on service are followed, unless rebutted by sufficient evidence. *Grant v. Ivy* (1980), 69 Ohio App.2d 40, 23 0.0.3d 34. In the absence of evidence to the contrary, the address used by a plaintiff in a complaint will be assumed to be an address where it is reasonable to anticipate that service will be delivered to the defendant. See *J.R. Productions Inc. v. Young* (1982), 3 Ohio App.3d 407.

Civ. R. 4.2(6) provides that:

> "Upon a corporation either domestic or foreign: by serving the agent authorized by appointment or by law to receive service of process; or by serving the corporation by certified mail at any of its usual places of business; or by serving an officer or a managing or general agent of the corporation;"

A corporation may be served within the meaning of Civ.R. 4 when the summons and complaint are served on a receptionist of the corporation who by all standards of legal interpretation is an agent of the corporation. We cannot envision the circumstances when the party delivered the summons and complaint will be allowed to match [sic] into the executive's office and hand deliver the summons to the chief executive officer. The first line of offense or defense in a corporation is the office of the

receptionist where the buck begins. If the receptionist is good enough to intercept all mail going to various people in the corporation before they reach their destinations, he is good enough to receive a summons and complaint destined to the officer within the line of his reception. If we sanction appellant's argument that a receptionist cannot accept a summons on behalf of his or her superiors, we would effectively put a nail to the service of process to corporations, and by legal fiat declare corporations immune from lawsuits because all the person who is supposed to receive the summons has to do is to remain in the office when told by no other but the receptionist that there is somebody at the desk to serve him with the summons. It would not be prudent on the officer's part to come out and be served with the summons when all he can do is to wait and come later to the court and plead the defense of improper service and avoid the lawsuit. We do not believe that the rules of service are intended for such cheap defenses. We also note that appellant never argued that it did not receive the summons, hence the record shows that it filed an answer, and responded to all motions.

Since appellant has failed to prove a defective service of process, its third assignment of error is overruled.

VI.

Appellant argues in its fourth assignment of error that the trial court's judgment violated the Ohio and United States Constitutions by convicting him of a quasi-criminal offense without a requisite scienter. We have dealt *supra* with the scienter issue and would not rehash

that argument all over again. We had already stated that although R.C. 2109.50 may be quasi-criminal, it does not carry all attributes of a criminal conviction, but is intended to accomplish one purpose which is to recover concealed or conveyed assets of a decedent and a requirement of scienter as anticipated in an ordinary criminal proceeding is unwarranted.

Appellant's fourth assignment of error is overruled.

VII.

Appellant argues in its fifth assignment of error that the trial court denied it its constitutional and statutory rights of a speedy trial and to a jury trial. This court will not be dragged into appellant's insistent characterization of R.C. 2109.50 as an ordinary criminal statute, which it is not, or accept a diversion of the real issue presented, which is whether appellant was properly convicted of an improper conveyance, which we hold that it was. Since appellant cannot properly characterize a R.C. 2109.50 conviction as a misdemeanor or a felony, it cannot prove a violation of either a constitutional or statutory right to a speedy trial. According to R.C. 2945.71 *et seq.*, a person has to be charged with a misdemeanor or felony to invoke the protection of the speedy trial laws. This argument, therefore, has no merit.

Appellant further argues that it was denied its right to a jury trial. There is no absolute right to a jury trial under R.C. 2109.50. Where as in this case there is no genuine issue to present to the jury, the trial court cannot and should not grant a jury trial even when requested. See R.C. 2109.52.

Appellant's fifth assignment of error is overruled.

VIII.

Appellant argues in its sixth assignment of error that it was denied right to discovery. Allowance of discovery and the limit thereof is within the sound discretion of the trial court and any party challenging the trial court's decision must demonstrate abuse of discretion. Appellant argues that the trial court prevented it from attempting to establish its defense of mens rea in its request for admission from the administrator of the estate. It is the burden of the party showing abuse of discretion when arguing the trial court's refusal to allow discovery to show that the trial court's denial was improvident and prejudicially affected his substantial right to an effective litigation. *Smith v. Klein* (1985)23 Ohio App.3d 146. Appellant has failed to show that it was prejudiced by the trial court's refusal to allow the questions put forth to the administrator, especially in light of our holding that appellant's mens rea in conveying the money belonging to the estate is irrelevant to its conviction under R.C. 2109.50.

Appellant's sixth assignment of error is overruled.

IX.

Appellant argues in its seventh assignment of error that the trial court erred in ruling on its motion to certify. We consider this assignment to require us to rule that the trial court erred in denying appellant's motion to certify, since where a court fails to rule upon an objection or motion, it will be presumed that the court overruled the objection or motion. *Solon v. Solon Baptist Temple* (1982), 8 Ohio App.3d 347.

Actions under R.C. 2109.50 et seq. are specifically to be brought in the probate court. R.C. Chapter 2109 does not require the trial court to certify an action to the court of common pleas when a party believes the court is either biased or may have an interest in the case. In the instant case, the trial court did not err in denying appellant's requests and instead transferred the case to another probate court. Assuming *arguendo* that certification is required as argued by appellant pursuant to R.C. 2101.38, the trial court was not shown to be an interested party as contemplated by the statute.

X.

Appellant in its eighth assignment of error argues that the trial court erred by denying its request for leave to file a complaint or cross-claim against other defendants. Appellant argues without substance that it was entitled to file a complaint under R.C. 2109.50 *et seq.* because TransOhio Savings Bank conveyed away assets belonging to it.

A careful review of R.C. 2109.50 *et seq.* reveals that action under the statute is reserved for a summary recovery of assets belonging to the deceased which is concealed or conveyed away. Since the Bank is not deceased within any imaginative interpretation of R.C. 2109.50 *et seq.*, it cannot be an interested party within the statute. Appellant's eighth assignment of error is without merit and the same is also overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Probate Court Division of the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

RECEIVED FOR FILING

MAR. 31, 1994
GERALD E. FUERST, CLERK
By /s/ Cmf Dep.

BLACKMON, P.J., and

PARRINO*, J., CONCUR.

/s/ Sara J. Harper
SARA J. HARPER
JUDGE

JOURNALIZED APR. 18, 1994

GERALD E. FUERST, Clerk of Courts
By /s/ Cmf Deputy

*Judge Thomas J. Parrino, Retired, of the Eighth Appellate District, sitting by assignment.

N.b. This entry is made pursuant to the third sentence of Rule 22 (D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will

become the judgment and order of the court and time period for review will begin to run.

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO
PROBATE DIVISION

IN RE:	)	CASE NO. 1057643
ESTATE OF JOAN E. POPP,	)	DOCKET 1056
	)	JUDGMENT ENTRY
DECEASED	)	(Filed Nov. 3, 1992)

This matter is before the Court on the Motion for Summary Judgment filed by Alan G. Gelbman, Administrator of the Estate of Joan E. Popp, deceased, on July 15, 1992, regarding his Complaint(s) for the Concealment, Embezzlement and Conveying Away Assets against Ohio Savings Bank. Arguments of counsel were heard on October 1, 1992. After due consideration of this Motion to Strike and supporting briefs and Brief in Opposition thereto and all other pertinent pleadings, this honorable Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Joan E. Popp died intestate on January 30, 1992, in Cuyahoga County.

2. On January 20, 1992, Respondent Ohio Savings Bank held $55,505.13 on deposit for decedent in Passbook Savings Account No. 816K00N006400.

3. On February 13, 1991, William A. Hamann, Jr. presented forged tax releases and forged letters of administration along with withdrawal slips to Respondent Ohio Savings Bank.

4. As of February 13, 1991, no fiduciary had been appointed with respect to decedent's estate.

5. As a result of the forged documents, Respondent Ohio Savings Bank issued a check in the amount of $55,833.86 to William A. Hamann, Jr., Administrator of the Estate of Joan E. Popp, who then negotiated the check.

6. On March 18, 1991, Alan G. Gelbman was appointed special Administrator of the Estate of Joan E. Popp, deceased, by this honorable Court.

7. On June 6, 1991, Alan G. Gelbman was appointed as Administrator of the Estate of Joan E. Popp, deceasedm [sic] by this Court.

8. William A. Hamann, Jr. was convicted of numerous charges of forgery, uttering, theft, et cetera, from this estate and others in the general division of the Cuyahoga County Common Pleas Court (see CR 271171 and CR 265744). William A. Hamann, Jr. was sentenced accordingly by Judge Kathleen A. Sutula, and is incarcerated at this time.

9. On November 22, 1991, an amended Complaint for Concealment, Embezzling or Conveying Away Assets was filed by the Administrator against Marvin P. Schatz, Cuyahoga Savings Bank, Ohio Savings Bank, First Federal Savings Bank, Third Federal Savings & Loan Association of Cleveland, Cardinal Federal Savings Bank and TransOhio Savings Bank, and on July 23, 1991, the original such Complaint was filed by the Administrator.

10. No portion of the proceeds of the aforementioned passbook savings account at Ohio Savings Bank

has been paid to Alan G. Gelbman, Administrator of the Estate of Joan E. Popp, deceased, as of the date of this Judgment Entry.

CONCLUSIONS OF LAW

1. R.C. 2109.50 provides in pertinent part:

> "Upon complaint made to the probate court having jurisdiction of the administration of a trust estate . . . , by a person interested in such trust estate . . . against any person suspected of having . . . conveyed away or . . . having been in the possession of any moneys, . . . of such estate, . . . "

2. The requisite Complaint for Concealment, Embezzlement and Conveying Away Assets, namely an Amended Complaint was filed November 22, 1991, and the original such Complaint was filed on July 23, 1991, in this case.

3. R.C. 2101.24(a)(1)(c) and R.C. 2101.24(c) provide this honorable Court with jurisdiction over the Popp estate.

4. Alan G. Gelbman, the Complainant, qualifies as a person interested in such estate, since he is its administrator.

5. The respondent Ohio Savings Bank, constitutes a "person" under the statute, by virtue of the broad statutory definition of person listed in R.C. 1.59(C), "As used in any statute, unless another definition is provided in such statute or a related statute: (c) 'person' includes an

individual, corporation, business trust, estate, trust, partnership, and association . . . "

6. Neither R.C. 2109.50 nor a related statute define person so R.C. 1.59 controls.

7. The Court finds that the jurisdictional requirements of R.C. 2109.50 have been met.

8. This honorable Court also finds that the above-referred to activity by Ohio Savings Bank in its issuance of its official check in the amount of $55,833.86 to William A. Hamann, Jr., purported Administrator of the Estate of Joan E. Popp, deceased, as a result of the aforementioned forged documents was in reliance upon such forged documents and constituted the conveying away of moneys or choses in action of the Joan E. Popp, trust estate within the meaning of R.C. 2109.50.

9. This Court also finds that Ohio Savings Bank's aforementioned activity in issuance of its official check to William A. hamann, [sic] Jr., (purported Administrator of the Estate of Joan E. Popp, deceased) was without legal authority and constituted its having been and being in possession of moneys or choses of action of the Joan E. Popp estate within the meaning of R.C. 2109.50.

10. This honorable Court also finds that by virtue of the foregoing, the Administrator has satisfied all of the requirements under O.R.C.P. Rule 56(C) for the granting of his Motion for Summary Judgment on his Complaint(s) against Ohio Savings Bank, namely:

(a) That there be no genuine issues as to the material facts.

(b) That he be entitled to judgment on such Complaint as a matter of law.

(c) That reasonable minds come to but one conclusion which conclusion be adverse to Ohio Savings Bank as the party against whom the Motion for Summary Judgment is made.

11. That the exhibits attached to the administrator's original Motion for Summary Judgment or his Reply Brief in support of such Motion conform to the requirements of O.R.C.P. Rules 56(C) and/or (E).

12. This Court finds that Ohio Savings Bank is therefore guilty of having conveyed away plus having been in possession of moneys and choses of action belonging to the Joan E. Popp Estate in the principal sum of $55,833.86 plus the 10% penalty thereon plus interest at the rate of 10% per annum from February 13, 1991 within the meaing [sic] of and pursuant to R.C. 2109.52.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. That the Motion for Summary Judgment on the Complaint(s) against Ohio Savings Bank by Alan G. Gelbman, Administrator of the Estate of Joan E. Popp, deceased, for the Concealment, Embezzlement and Conveying Away Assets is granted in the principal amount of $55,833.86, plus 10% penalty plus interest at the 10% per annum from February 13, 1991 and costs be and is hereby granted.

2. That Ohio Savings Bank be found and is guilty of having conveyed away and having been in possession of moneys and choses in action belonging to the Joan E. Popp Estate within the meaning of and pursuant to R.C.

2109.52 in the principal amount of $55,833.86 plus 10% penalty thereon plus 10% per annum interest from February 13, 1991 and costs for which execution may issue.

3. That the Clerk of Court shall serve upon all parties notice of this Judgment and date of entry pursuant to O.R.C.P. RULE 58(B).

NOV 3 1992

/s/ John E. Corrigan
PROBATE JUDGE

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

(Effective 1791)

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President

and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss of emancipation of any slave; but

all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

(Effective 1868)

§ 2109.50 Proceedings when assets concealed or embezzled.

Upon complaint made to the probate court of the county having jurisdiction of the administration of a trust estate or of the county wherein a person resides against whom the complaint is made, by a person interested in such trust estate or by the creditor of a person interested in such trust estate against any person suspected of having concealed, embezzled, or conveyed away or of being or having been in the possession of any moneys, chattels, or choses in action of such estate, said court shall by citation, attachment or warrant, or, if circumstances require it, by warrant or attachment in the first instance, compel the person or persons so suspected to forthwith appear before it to be examined, on oath, touching the matter of the complaint. Where necessary such citation, attachment or warrant may be issued into any county in the state and shall be served and returned by the officer to whom it is delivered. The officer to whom such process is delivered shall be liable for negligence in its service or return in like manner as sheriffs are liable for negligence in not serving or returning a capias issued upon an indictment. Before issuing an extra-county citation, attachment or warrant, the probate judge may require the complainant to post security with the probate court in such amount and in such form as the probate judge shall find acceptable in order to cover the costs of the proceeding under this section, including in such costs a reasonable allowance for the travelling expenses of the person or persons against whom an extra-county citation, attachment or warrant is to be issued. Such security may be in the form of a bond, the amount, terms, conditions and

sureties of which shall be subject to the approval of the probate judge.

The probate court may initiate proceedings on its own motion.

The probate court shall forthwith proceed to hear and determine the matter.

The examinations, including questions and answers, shall be reduced to writing, signed by the party examined, and filed to the probate court.

If required by either party, the probate court shall swear such witnesses as may be offered by either party touching the matter of such complaint and cause the examination of every such witness, including questions and answers, to be reduced to writing, signed by the witness, and filed in the probate court.

All costs of such proceedings, including the reasonable travelling expenses of a person against whom an extra-county citation, attachment or warrant is issued, shall be assessed against and paid by the party making the complaint, except as provided by section 2109.52 of the Revised Code.

HISTORY: GC §§ 10506-67, 10506-68, 10506-70, 10506-71, 10506-72; 114 v 320(379); Bureau of Code Revision, 10-1-53; 128 v 76. Eff 11-9-59.

§ 2109.51 Imprisonment for disobeying citation.

If a person compelled under section 2109.50 of the Revised Code to appear for examination refuses to answer interrogatories propounded, the probate court

shall commit such person to the county jail and such person shall remain in close custody until he submits to the court's order.

HISTORY: GC § 10506-69; 114 v 320(379); Bureau of Code Revision, 10-1-53; 128 v 76. Eff 11-9-59.

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§ 2109.52 Judgment on the complaint.

When passing on a complaint made under section 2109.50 of the Revised Code the probate court shall determine, by the verdict of a jury if either party requires it or without if not required, whether the person accused is guilty of having concealed, embezzled, conveyed away, or been in the possession of moneys, chattels, or choses in action of the trust estate. If such person is found guilty, the probate court shall assess the amount of damages to be recovered or the court may order the return of the specific thing concealed or embezzled or may order restoration in kind. The probate court may issue a citation into any county in this state, which citation shall be served and returned as provided in section 2109.50, requiring any person to appear before it who claims any interest in the assets alleged to have been concealed, embezzled, conveyed, or held in possession and at such hearing may hear and determine questions of title relating to such assets. In all cases, except when the person found guilty is the fiduciary, the probate court shall forthwith render judgment in favor of the fiduciary or if there is no fiduciary in this state, the probate court shall render judgment

in favor of the state, against the person found guilty, for the amount of the moneys or the value of the chattels or choses in action concealed, embezzled, conveyed away, or held in possession, together with ten per cent penalty and all costs of such proceedings or complaint; except that such judgment shall be reduced to the extent of the value of any thing specifically restored or returned in kind as provided in this section.

If the person found guilty is the fiduciary, the probate court shall forthwith render judgment in favor of the state against him for such amount or value, together with penalty and costs as provided in this section.

HISTORY: GC § 10506-73; 114 v 320(379); Bureau of Code Revision, 10-1-53; 128 v 76. Eff 11-9-59.

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§ 2929.11 Penalties for felony.

* * *

(C) Fines for felony shall be imposed as follows:

(1) For an aggravated felony of the first degree or a felony of the first degree, not more than ten thousand dollars;

(2) For an aggravated felony of the second degree or a felony of the second degree, not more than seven thousand five hundred dollars;

(3) For an aggravated felony of the third degree or a felony of the third degree, not more than five thousand dollars;

(4) For a felony of the fourth degree, not more than two thousand five hundred dollars.

* * *

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§ 2945.17 Right to trial by jury.

At any trial, in any court, for the violation of any statute of this state, or of any ordinance of any municipal corporation, except in cases in which the penalty involved does not exceed a fine of one hundred dollars, the accused has the right to be tried by a jury.

Chapter 252

STANDARD INSTRUCTION CONCEALED OR EMBEZZLED ASSETS

252.01 Complaint, Definitions, Defenses, Conclusion

1. The defendant is accused of having (concealed) (embezzled) (conveyed away) (being in the wrongful possession of) (monies) (chattels) (choses in action) (*describe*), the property of the Estate of _____. Before you can find the defendant guilty, you must find by the greater weight of the evidence that:

(A) The (assets were) (property was) owned by (*describe trust* or *estate*).

(B) The defendant (received) (obtained) the (assets) (property) and (concealed them) (embezzled them) (conveyed them away) (held them in his possession), and his conduct was knowingly wrongful.

2. DEFINITIONS.

(A) MONIES. "Monies" means cash, gold, silver or paper money used as medium of exchange.

(B) CHATTELS. "Chattels" are articles of personal property.

(C) CHOSES IN ACTION. A chose in action is a right to receive or recover a debt, demand, or damages in a court of law.

(D) CONCEAL. "Conceal" means to hide, secrete or keep from the discovery or observation of others.

(E) EMBEZZLE. "Embezzle" means to keep or use (money) (chattels) (choses in action) (property) (*describe*) intrusted to him by (another) (the estate).

(F) CONVEY AWAY. "Convey away" means to transfer or deliver ownership or possession to another.

(G) KNOWINGLY. A person acts knowingly when he is aware that his conduct (will probably cause a certain result) (will probably be of a certain nature). Since you cannot look into the mind of another, (knowledge) (whether a person acted knowingly) is determined from all the facts and circumstances.

(H) WRONGFUL. "Wrongful" means injurious, unjust, or unfair. A wrongful act is one which violates the rights of another.

3. DEFENSES.

The defendant claims that he was (given) (authorized to use) (authorized to hold or convey) (*specify defense*) the property (or that the property is not the property of the estate).

4. CONCLUSION. If you find that the (plaintiff) (complainant) proved by the greater weight of the evidence both elements of this accusation, your verdict must be guilty. If you find that the (plaintiff) (complainant) failed to prove either element, your verdict must be not guilty.

5. REQUIRED NUMBER TO REACH VERDICT. 1 OJI 25.10 § 4.

6. PENALTY. Your sole function is to decide whether the defendant is guilty or not guilty. The court has the duty to render a final judgment.

Supreme Court, U.S.
FILED
FEB 6 1995
CLERK OF THE COURT

No. 94-1232

In The

Supreme Court of the United States

October Term, 1994

OHIO SAVINGS BANK,

Petitioner,

vs.

THE ESTATE OF JOAN POPP,

Respondent.

On Petition For Writ Of Certiorari
To The Ohio Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Is the trial court's Judgment against the petitioner for damages in a specified dollar amount and a 10% monetary penalty thereon pursuant to § 2109.52 of the Ohio Revised Code the equivalent of a felony conviction under Ohio law so as to entitle it (Ohio Savings Bank) under the U.S. constitution to:

1. A mandatory jury trial required by the Sixth Amendment therein; and/or

2. Avoidance of any determination of liability under R.C. 2109.52 pursuant to the Fourteenth Amendment herein unless the respondent can prove that it (petitioner) acted with knowledge and/or a culpable mental state?

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Hugh A. Carlin, Attorney for the Estate of Joan Popp, hereinafter referred to as "respondent" respectfully submits this Memorandum in Opposition to the Petition for Writ of Certiorari previously filed by petitioner herein, Ohio Savings Bank, hereinafter referred as "OSB".

OPINIONS BELOW

The opinions in question are set forth on pp. 1 and 2, and Appendixes ("App.") 1, 2, and 21 of OSB's previously filed petition with this honorable Court.

JURISDICTIONAL STATEMENT

OSB's previously filed petition with this Court fails to set forth any substantial United States constitutional issue so as to provide it (this Court) with any reason to exercise its discretion to review the aforementioned Ohio Courts' Judgments within the meaning of Rule 10(1), *Rules of the Supreme Court.*

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

U.S. Constitution, Sixth Amendment provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

App. 1.

The Fourteenth Amendment to the U.S. Constitution provides in part that:

> "*Section 1.* All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . . "

App. 2.

Section 2109.50 of the Ohio Revised Code provides:

"Upon complaint made to the probate court of the county having jurisdiction of the administration of a trust estate or of the county wherein a person resides against whom the complaint is made, by a person interested in such trust estate or by the creditor of a person interested in such trust estate against any person suspected of having concealed, embezzled, or conveyed away or of being or having been in the possession of any moneys, chattels, or choses in action of such estate, said court shall by citation, attachment or warrant, or, if circumstances require it, by warrant or attachment in the first instance, compel the person or persons so suspected to forthwith appear before it to be examined, on oath, touching the matter of the complaint. Where necessary such citation, attachment or warrant may be issued into any county in the state and shall be served and returned by the officer to whom it is delivered. The officer to whom such process is delivered shall be liable for negligence in its service or return in like manner as sheriffs are liable for negligence in not serving or returning a capias issued upon an indictment. Before issuing an extra-county citation, attachment or warrant, the probate judgment may require the complainant to post security with the probate court in such amount and in such form as the probate judge shall find acceptable in order to

cover the costs of the proceeding under this section, including in such costs a reasonable allowance for the travelling expenses of the person or persons against whom an extra-county citation, attachment or warrant is to be issued. Such security may be in the form of a bond, the amount, terms, conditions and sureties of which shall be subject to the approval of the probate judge.

The probate court may initiate proceedings on its own motion.

The probate court shall forthwith proceed to hear and determine the matter.

The examinations, including questions and answers, shall be reduced to writing, signed by the party examined, and filed in the probate court.

If required by either party, the probate court shall swear such witnesses as may be offered by either party touching the matter of such complaint and cause the examination of every such witness, including questions and answers, to be reduced to writing, signed by the witness, and filed in the probate court.

All costs of such proceedings, including the reasonable travelling expenses of a person against whom an extra-county citation, attachment or warrant is issued, shall be assessed against and paid by the party making the complaint, except as provided by Section 2109.52 of the Revised Code."

App. 3.

Section 2109.52 of the Ohio Revised Code provides:

"When passing on a complaint made under Section 2109.50 of the Revised Code, the probate court shall determine, by the verdict of a jury if either party requires it or without if not required, whether the person accused is guilty of having concealed, embezzled, conveyed away, or been in the possession of moneys, chattels, or choses in action of the trust estate. *If such person is found guilty, the probate court shall assess the amount of damages to be recovered or the court may order the return of the specific thing concealed or embezzled or may order restoration in kind.* The probate court may issue a citation into any county in this state, which citation shall be served and returned as provided in Section 2109.50, requiring any person to appear before it who claims any interest in the assets alleged to have been concealed, embezzled, conveyed, or held in possession and at such hearing may hear and determine questions of title relating to such assets. *In all cases, except when the person found guilty is the fiduciary, the probate court shall forthwith render judgment in favor of the fiduciary or if there is no fiduciary in this state, the probate court shall render judgment in favor of the state, against the person found guilty, for the amount of the moneys or the value of the chattels or choses in action concealed, embezzled, conveyed away, or held in possession, together with ten percent penalty and all costs of such proceeding or complaint;* except that such judgment shall be reduced to the extent of the value of any thing specifically restored or returned in kind as provided in this Section.

If the person found guilty is the fiduciary, the probate court shall forthwith render judgment in favor of the state against him for such amount or value, together with penalty and costs as provided in this Section." (Emphasis supplied)

App. 4.

STATEMENT OF THE CASE

The pertinent facts of the case are as follows:

Joan Popp died on January 30, 1991. On January 30, 1991, there existed a savings account solely in the name of Joan Popp at Ohio Savings Bank with a $55,505.13 balance on that date (App. 6, p. 9).

On February 13, 1992, said savings account was reduced to a zero balance by OSB's payment to William A. Hamann, Administrator of $55,833.86 (App. 5 and 6, p. 11), based on the documents he presented to them. Those documents included a forged Cuyahoga County Probate Court Letters of Administration in his name, and a forged Ohio Estate Tax Release (App. 6, pp. 10 and 12, respectively).

As of February 13, 1991, there was no lawfully appointed Administrator of the Estate of Joan Popp, Deceased.

The aforementioned forged Letters of Administration used by Hamann to withdraw the entire balance of Joan Popp's savings account from OSB was irregular on its face because in the printed portion it referred to: "I,

Francis J. Talty, Judge of the Probate Court within and for said County," however, the forged signature is that of John J. Donnelly, Probate Judge (App. 6, p. 10).

On or about July 23, 1991, the Administrator of the Estate of Joan Popp filed a Complaint for the Concealment, Embezzlement or Conveying Away Assets pursuant to the authority of R.C. 2109.50 in the Cuyahoga County Probate Court against various defendants including Hamann and OSB. The Administrator's Complaint alleged that OSB concealed, embezzled or conveyed away or is or was in possession of moneys, chattels or choses of action of the Popp estate.

In March, 1992, OSB filed a Complaint in Cuyahoga County Common Pleas Court, Case No. 228027, entitled *OSB v. Transohio Savings Bank, William A. Hamann, Jr., Marvin P. Schatz, and Virginia Popp Durma.*

On May 28, 1993, OSB took the deposition of Hamann in the aforementioned related civil action removed to U.S. District Court, Case No. 1:92CV 2025. The pertinent portions of such deposition were:

> (a) The seal on the forged Letters of Administration was altered to limit the notary seal to include the words "State of Ohio, Cuyahoga County" (App. 7, p. 22).
>
> (b) With respect to the forged Ohio Estate Tax Release, it was used for a Cuyahoga County resident but did not have the stamp used for tax releases from that county but only had a signature line or block (App. 7, pp. 22-24, App. 6, p. 12).

In addition, counsel for substituted defendant, Resolution Trust Corporation, obtained by discovery from

OSB in the U.S. District Court case, its internal operations manual regarding the procedure to be followed in closing various accounts including those of deceased depositors (See Appendix 8, p. 30 entitled, *"III Converting, Transferring and Closing Procedures for Decedent Account, Sec(a)(5)"*.)

On November 3, 1992, the Cuyahoga County Probate Court rendered its judgment in favor of appellee on its R.C. 2109.50 Complaint against OSB in the principal amount of $55,833.86 and the 10% penalty thereon required by R.C. 2109.52.

On or about December 30, 1992, the Cuyahoga County Probate Court awarded the undersigned attorney fees totalling $33,000 (computed at the rate of $125 per hour) of which amount $12,750 was attributable solely to the commencement and prosecution of the aforementioned R.C. 2109.50 *et. seq.* proceeding against OSB through that date.

The Eighth District Court of Appeals, Case No. 64718, App. 2; OSB's Petition for Writ of Certiorari, on September 21, 1994, the Supreme Court of Ohio, Case No. 94-1253 rendered its Judgment Entry wherein it declined jurisdiction to hear OSB's appeal from the Eighth District Court of Appeals Judgment dated April 18, 1993.

REASONS FOR REJECTION

Since Sections 2109.50 and 2109.52 of the Ohio Revised Code as applied against OSB in this case are statutes which govern a civil proceeding with a financial or pecuniary penalty rather than a quasi criminal or

criminal proceeding, OSB has no United States constitutional issue for this honorable Court's review.

R.C. 2109.50 and .52 have been held to constitute a civil proceeding, namely for conversion with a financial penalty, *Wozniak v. Wozniak*, 90 Ohio App.3d 400 (Court of Appeals of Ohio, Summit County, 1993); *In Re Howard*, 79 Ohio App. 203 (Franklin County Court of Appeals, 1947); *Linquist v. Hayes, Administrator*, 22 Ohio App. 141 (Lucas County Court of Appeals, 1926). Page 407 of *Wozniak, supra*, described the nature of the inquiry under R.C. 2109.50 as follows:

> "The inquiry under R.C. 2109.50 focuses on the ownership of the asset and whether possession of the asset is being impermissibly concealed or withheld from the estate. Thus, a plaintiff has stated an actionable cause under R.C. 2109.50 if he alleges that the asset is the exclusive property of the estate and that the defendant has unauthorized possession of the asset or in some way has impermissibly disposed of it. See *Fecteau*, 171 Ohio St. at 125, 12 O.O.2d at 141, 167 N.E.2d at 893."

Pages 411 and 412 of *Wozniak, supra*, described the nature of an action under R.C. 2109.50 as civil, namely for conversion with the complainant's accompanying rights to recover pre and/or post judgment interest as follows:

> "In a civil action, the recovery of prejudgment interest is afforded litigants under both the common law and the statutory provision of R.C. 1343.03(C). *Moore v. Univ. of Cincinnati Hosp.* (1990), 67 Ohio App.3d 152, 154, 586 N.E.2d 213, 214. Generally, though, Ohio common law does not allow prejudgment interest in civil actions

based on tortious conduct. *Id.; Cleveland Ry. Co. v. Williams* (1926), 115 Ohio St., 584, 155 N.E. 133, syllabus. Some exceptions to this general rule exist, in particular, actions for conversion of personal property. *Lyle v. Durham* (1984), 16 Ohio App.3d 1, 3, 16 OBR 1, 3, 473 N.E.2d 1216, 1218; *Booth v. Cincinnati Finance Co.* (1923), 19 Ohio. App. 130, 135, aff'd (1924), 111 Ohio St. 361, 145 N.E. 543; *Morris v. Pearl Street Auction Co.* (1939), 61 Ohio App. 452, 15 O.O. 283, 22 N.E.2d 740."

The sole legislative purpose of an Ohio Revised Code 2109.50 proceeding is to provide a speedy and effective way of discovering moneys, chattels or choses in action belonging to a trust estate and of securing their return for administration, *In Re Black* 145 Ohio St. 405 (1945), and *Wozniak, supra*. Compare this statutory purpose to that of a solely criminal proceeding which is to determine whether the defendant has violated a rule of conduct required by society and to punish him or it accordingly.

In support of its previously filed Writ of Certiorari, OSB primarily relies on the premise that the 10% penalty under R.C. 2109.52 made its adjudication of liability thereunder a felony conviction by the trial court. OSB's reliance on this premise is misplaced for any or all of the following reasons:

1. This 10% financial penalty is not punitive in nature but is compensatory at least to the extent that it at least partially reimburses the complainant for his expenses for the commencement and completion of proceedings under R.C. 2109.50, *et. seq.* The language of R.C. 2109.50 and .52 clearly demonstrates that they are self-

contained statutory provisions which are silent as to compensation of a prevailing complainant for any expenses of this litigation other than court costs. As applied to this case, the Popp estate legal expenses through trial were at 2.5 times the $5,583.86 (10% statutory penalty) assessed against OSB. It is estimated that through the completion of this brief's preparation (based on the Probate Court allowed hourly rate of $125), the Popp estate legal expenses will be at least four times the $5,583.86 statutory penalty assessed against OSB by the trial court.

2. Sections 2109.50 and .52 of the Ohio Revised Code make no provision for the award of any interest to a successful complainant. Therefore, the 10% penalty under the latter statutory provision is the equivalent to the 10% interest rate applicable to a plaintiff judgment in a civil proceeding required by § 1343.03(A) of the Ohio Revised Code.

OSB's contention that R.C. 2109.52 could result in a 10% statutory penalty totalling an astronomical fixed amount in dollars such as one million dollars should be rejected and ignored by this Court in this case because: (1) it has absolutely nothing to do with the actual statutory financial penalty required to be assessed against petitioner under this statutory provision; and (2) this financial penalty is the functional equivalent to the 10% interest rate required for a plaintiff judgment in an Ohio Civil proceeding.

OSB argues that the 10% statutory penalty assessed against it by the trial court is the equivalent of either a second degree felony conviction or at least the fine therefor. This contention ignores and fails to take into account

Ohio law as to the mandatory penalties applicable to a second degree felony conviction. Section 2929.11(B)(5) of the Ohio Revised Code provides as follows:

> "Except as provided in Division D of this Section or Sections 2329.71 and 2329.72 and Chapter 2925 of the Revised Code, *terms of imprisonment for a felony shall be imposed as follows*:
>
> *(5) for a felony of the second degree, the minimum term shall be two, three, four or five years, and the maximum term shall be fifteen years.*" (Emphasis provided)

Section 2929.11(C)(2) of the Ohio Revised Code provides that the maximum fine for a second degree felony shall not exceed $7,500.

Section 2929.14(B) of the Ohio Revised Code limits the sentencing court's authority in a criminal proceeding to impose a fine in a citation to imprisonment for a felony conviction as follows:

> "(B) *The court shall not impose a fine in addition to imprisonment for a felony unless a fine is specifically adapted to deterrence of the offense or correction of the offender,* or the offense was committed with the purpose of establishing, maintaining, or facilitating an activity of a criminal syndicate, as defined in § 2923.04 of the Revised Code, or the offense was committed for hire or purpose of gain." (Emphasis supplied)

At least two Ohio cases have held that a fine without imprisonment of the defendant (whether conditionally suspended and/or probationable) renders that conviction void, *State v. Beasley*, 14 Ohio St.3d 175 (1984), and *State v.*

Hill, 72 Ohio App.3d 233, 594 N.E.2d 164 (Cuyahoga County Court of Appeals, 1991).

R.C. 2109.52, however, makes no provision for the imprisonment of any defendant or respondent adjudged to be guilty thereunder or under R.C. 2109.50. Therefore, in the absence of any proof by OSB that the Ohio legislature intended to enact a statute which would be void on its face for requiring a criminal conviction without any mandatory, conditional or unconditional imprisonment of the defendant, the 10% penalty referred to above should not make R.C. 2109.52 a wholly criminal statute.

In addition, this aforementioned mandatory-fixed 10% penalty does not meet any of the following criteria set forth in R.C. 2929.14(B) for imposing a fine in addition to imprisonment for a felony conviction: (1) that the fine be specifically adapted to the deterrence of any offense described in R.C. 2109.50 and .52; (2) that it (the fine) be specifically adapted to the correction of the offender, namely OSB in this case. That is, economic/business decisions and criteria, not the $5,583.38 mandatory financial penalty from this case will govern OSB's future conduct regarding the closing of a customer's bank account after his or her death.

None of the cases cited in OSB's Petition for Writ of Certiorari, namely pp. 8-29 inclusive, are appropriate for this Court's determination of whether R.C. 2109.52 as applied to it by the trial court in this case deprived it of its Fourteenth Amendment right to due process and/or equal protection under the law or its Sixth Amendment right to trial by jury.

Some of OSB's aforementioned cited cases fall into the following categories distinguishable from the 10% mandatory penalty involved in R.C. 2109.52:

1. The commission of a crime against and properly involving imprisonment, fine or both for conviction, *Morisette v. United States*, 342 U.S. 246, 72 S.Ct. 240 (1952); *Liparota v. United States*, 471 U.S. 419, 105 S.Ct. 2084 (1985); *U.S. v. Halper*, 490 U.S. 435, 109 S. CT. 1892 (1989); *U.S. v. Garcia*, 751 F.2d 1033 (9th Cir. 1985).

2. The commission of a crime against a person involving imprisonment, fine or both, *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444 (1968).

3. Violation of a prior court order involving some form of imprisonment without a fine *Hicks v. Feiock*, 485 U.S. 624, 108 S. CT. 1423 (1988); *Penfield Co. v. SEC*, 330 U.S. 585 (1947).

In OSB's cited case of *Bloom v. State of Illinois*, 391 U.S. 194, 88 S.Ct. 1477 (1968), the defendant was accused of criminal contempt for presenting for probate a false/fraudulent will prepared after decedent died and was sentenced to jail under a statute with no stated minimum or maximum confinement period and with no fine. There is no comparison between that case and the case at bar which involved an adjudication of guilty for monetary damages and 10% penalty thereon but no imprisonment.

In OSB's cited case of *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558, 91 S.Ct. 1697 (1971), the defendant was charged with violation of a statute which prohibited the shipment of corrosive liquids in interstate commerce without so labeling them. There is no

comparison between that case which involves an act dangerous to public safety and the case at bar, which involved a transfer of a decedent's bank account balance to a person not legally entitled to receive it.

In OSB's cited case of *United States v. United States Gypsum*, 438, U.S. 422, 98 S.Ct. 2864 (1978), the defendant was charged with conspiring with competitors to keep prices down in restraint of trade. In that case, it was not always apparent whether the act in question was economically justifiable or in restraint of trade until after it occurred. Contrast that situation with this case where OSB transferred a decedent's bank account to a person not legally entitled or authorized to receive it based on documents irregular on their face and contrary to their own internal rules, regulations and procedures required to close a deceased depositor's account at that financial institution.

In OSB's cited case of *Southwestern Tel. Co. v. Danahar*, 238 U.S. 482, 35 S.Ct. 886 (1915), a statutory penalty was involved at $100 per day for 63 days due to the defendant telephone company's failure to provide telephone service to a previously delinquent bill paying customer unless and until she provided a deposit. In that case, this Court found that the regulations which the defendant was enforcing were reasonable due to the prohibitive expense it would otherwise incur to collect its delinquent telephone bills and that the statutory penalty of $6,300 as compared to the approximately $10 telephone bill involved was disproportionate to the actual financial loss it caused the customer by enforcement of those regulations. Contrast that situation to the case at bar where

OSB's violation of R.C. 2109.52 caused respondent financial loss at least two to four times the amount of the 10% statutory penalty in question and the nominal time spent and expense incurred if upon seeing documents irregular on their face, it called the Probate Court to confirm whether Hamann was the Popp Estate Administrator.

OSB's cited case of *Missouri Pacific Ry. v. Tucker*, 230 U.S. 340, 33 S.Ct. 961 (1913), this Court fixed mandatory financial penalty in question was $500 as compared to the actual defendant's shipment overcharge of $3.02. That situation is totally unlike the assessment of the 10% penalty against OSB in the case at bar which is less than one-fourth of the respondent's costs in prosecution or proceedings under R.C. 2109.50 and .52 including all Appellate Court, Ohio Supreme Court, and U.S. Supreme Court proceedings to date.

OSB's cited case of *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S.Ct. 554 (1963), defendants were charged with fleeing the U.S. to avoid military service, the penalty for which was loss of U.S. citizenship. Contrast the potential loss of liberty in terms of loss of freedom to return to the U.S. (and in the case of one of the defendants involved, his potential of becoming a stateless person), if the defendants were found guilty in that case to the 10% penalty involved in this case which is a small fraction of the respondent's total financial losses including litigation expense caused by the petitioner.

Page 13 of OSB's Petition for Writ of Certiorari contends that both the amount of the 10% penalty in question and its mandatory penalty renders it solely criminal in

nature. This contention, however, ignores the basic characteristics set forth in *Hicks v. Feiock, supra,* which differentiate between civil and criminal contempt proceedings. In that case, this Court set forth the characteristics of a civil contempt proceeding as including the following: (1) Punishment must be remedial and inure for the complainant's benefit; and (2) when the punishment involves a fine, it is paid to the complainant or can be avoided by performing the act required by the prior court order.

In *Hicks v. Feiock, supra,* this Court set forth the characteristics of a criminal contempt proceeding as including the following: (1) Punishment is rendered to show the court's authority with respect to the underlying proceeding wherein the contemptuous conduct occurred; and (2) where the punishment involves a fine, it is required to be paid to the court.

R.C. 2109.50 and .52 do not involve either civil or criminal contempt proceeding because none of the prohibited conduct described therein involves any violation of a prior court order. The 10% monetary penalty in R.C. 2109.52, however, involves both of the characteristics of civil contempt described above, namely remedial punishment which is for the benefit of the complainant, namely payment of the monetary assessment involved directly the Popp estate as the complainant rather than the trial court.

This 10% penalty, however, does not involve any of the characteristics of a criminal contempt proceeding enumerated above since it is not punishment for the trial court to show its authority after one or more of its prior orders were violated by the defendant and since it is not

paid to the court when the complainant is the fiduciary of a victimized trust, estate or guardianship.

OSB will not benefit from the possible remand of the respondent's complaint to the Cuyahoga County Probate Court for further proceedings based on any alleged Fourteenth Amendment right to avoidance of Judgment under 2109.52 without proof that it acted with knowledge and/or a culpable mental state because:

1. It permitted the transfer of Joan Popp's funds on deposit after her death to a person not authorized to receive them in reliance on certain documents which were irregular on their face; namely: (a) that forged Letters of Administration which had typed in the name of one Probate Judge but with the purported signature of a second Probate Judge, App. 6, p. 10; and (b) the forged Letters of Administration also had a partial seal which was not from or by the Probate Court, see the portion of Hamann's deposition set forth at App. 7, p. 21.

2. It permitted the transfer of Joan Popp's funds on deposit after her death to a person not authorized to receive them in a manner contrary to its own written internal manual/procedure for doing so, (App. 8, p. 30). This regulation/written procedure required that when a deceased customer's account was to be closed, the check must be made payable to "The Estate of (decedent's name)" or to "(name of fiduciary), (title) of the Estate of (decedent's name)" (i.e., William A. Hamann, Administrator of the Estate of Joan Popp, Deceased). In this case, however, the check to reduce the Popp account to a zero balance issued by OSB after her death was made payable

to "William A. Hamann, Administrator", (App. 5, App. 6, p. 11).

3. It also permitted the transfer of Joan Popp's funds to a person not authorized to receive them in reliance on an Ohio Estate Tax Release which was not authorized in the generally accepted/customary manner, namely with a stamp from the Cuyahoga County Auditor (as the local agent for the Ohio Department of Taxation, Estate Tax) rather than the signature line actually used, (App. 6, p. 12, and App. 7, pp. 22-24).

OSB will not benefit from the possible remand of respondent's complaint to the trial court for further proceedings because of an alleged violation of its Sixth Amendment and/or Ohio Statutory right to a jury trial because: (1) it previously waived its right to a jury trial by conceding that respondent's complaint against it was a civil proceeding when it filed in December, 1992, a Motion to Dismiss this Complaint and/or for Summary Judgment. OSB cannot have it both ways, namely to initially treat the complaint as a civil proceeding by filing a Motion for Summary judgment but thereafter contend that the proceeding was criminal or quasi-criminal, only after losing that Motion; and (2) as a civil proceeding, respondent was properly granted Motion for Summary Judgment by the trial court on its complaint when it satisfied the requirements to do so set forth in O.R.C.P., Rule 56(C). Such requirements were that there be no genuine issues as to the material facts and that the movent be entitled to judgment as a matter of law.

CONCLUSION

For the foregoing reasons, respondent concludes as follows:

1. That the trial court's rendering judgment against OSB pursuant to R.C. 2109.52 for $55,833.81 and 10% penalty thereon did not deny it due process of law, within the meaning of the Fourteenth Amendment to the U.S. Constitution merely because there was no proof before such judgment that it acted knowingly and/or with criminal intent.

2. That the rendering of this judgment was not prejudicial to OSB since even with a remand to the trial court, the existence of knowledge by OSB that it transferred the proceeds of the Popp account a person not authorized to receive them could be proven at that time.

3. That the trial court's rendering judgment against OSB on Summary Judgment did not deny its constitutional and/or statutory right to a jury trial since all of the summary judgment requirements set forth in O.R.C.P., Rule 56(C) were satisfied.

Respectfully submitted,

HUGH A. CARLIN (0010723)
Counsel of Record
14600 Detroit Avenue #1150
Lakewood, Ohio 44107
(216) 221-2323

Attorney for Respondent

APPENDIX 1

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

U.S. Constitution, Sixth Amendment provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

APPENDIX 2

The Fourteenth Amendment to the U.S. Constitution provides in part that:

> "*Section 1.* All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . . "

APPENDIX 3

Section 2109.50 of the Ohio Revised Code provides:

"Upon complaint made to the probate court of the county having jurisdiction of the administration of a trust estate or of the county wherein a person resides against whom the complaint is made, by a person interested in such trust estate or by the creditor of a person interested in such trust estate against any person suspected of having concealed, embezzled, or conveyed away or of being or having been in the possession of any moneys, chattels, or choses in action of such estate, said court shall by citation, attachment or warrant, or, if circumstances require it, by warrant or attachment in the first instance, compel the person or persons so suspected to forthwith appear before it to be examined, on oath, touching the matter of the complaint. Where necessary such citation, attachment or warrant may be issued into any county in the state and shall be served and returned by the officer to whom it is delivered. The officer to whom such process is delivered shall be liable for negligence in its service or return in like manner as sheriffs are liable for negligence in not serving or returning a capias issued upon an indictment. Before issuing an extra-county citation, attachment or warrant, the probate judgment may require the complainant to post security with the probate court in such amount and in such form as the probate judge shall find acceptable in order to cover the costs of the proceeding under this section, including in such costs a reasonable allowance for the travelling expenses of the person or persons against whom an extra-county

citation, attachment or warrant is to be issued. Such security may be in the form of a bond, the amount, terms, conditions and sureties of which shall be subject to the approval of the probate judge.

The probate court may initiate proceedings on its own motion.

The probate court shall forthwith proceed to hear and determine the matter.

The examinations, including questions and answers, shall be reduced to writing, signed by the party examined, and filed in the probate court.

If required by either party, the probate court shall swear such witnesses as may be offered by either party touching the matter of such complaint and cause the examination of every such witness, including questions and answers, to be reduced to writing, signed by the witness, and filed in the probate court.

All costs of such proceedings, including the reasonable travelling expenses of a person against whom an extra-county citation, attachment or warrant is issued, shall be assessed against and paid by the party making the complaint, except as provided by Section 2109.52 of the Revised Code."

APPENDIX 4

Section 2109.52 of the Ohio Revised Code provides:

"When passing on a complaint made under Section 2109.50 of the Revised Code, the probate court shall determine, by the verdict of a jury if either party requires it or without if not required, whether the person accused is guilty of having concealed, embezzled, conveyed away, or been in the possession of moneys, chattels, or choses in action of the trust estate. *If such person is found guilty, the probate court shall assess the amount of damages to be recovered or the court may order the return of the specific thing concealed or embezzled or may order restoration in kind.* The probate court may issue a citation into any county in this state, which citation shall be served and returned as provided in Section 2109.50, requiring any person to appear before it who claims any interest in the assets alleged to have been concealed, embezzled, conveyed, or held in possession and at such hearing may hear and determine questions of title relating to such assets. *In all cases, except when the person found guilty is the fiduciary, the probate court shall forthwith render judgment in favor of the fiduciary or if there is no fiduciary in this state, the probate court shall render judgment in favor of the state, against the person found guilty, for the amount of the moneys or the value of the chattels or choses in action concealed, embezzled, conveyed away, or held in possession, together with ten percent penalty and all costs of such proceeding or complaint;* except that such judgment shall be reduced to the extent of the value of any thing specifically

restored or returned in kind as provided in this Section.

If the person found guilty is the fiduciary, the probate court shall forthwith render judgment in favor of the state against him for such amount or value, together with penalty and costs as provided in this Section." (Emphasis supplied)

APPENDIX 5

05 833407

OHIO SAVINGS BANK
1801 EAST NINTH STREET CLEVELAND, OHIO 44114

OFFICIAL CHECK
TWO SIGNATURES REQUIRED WHEN OVER $5,000.00

FEB 13 91

PLAINTIFF'S EXHIBIT A

PAY TO THE ORDER OF WILLIAM A. HAMANN, ADMINISTRATOR $55,833.86

$55,833.86

TO CLOSE ACCOUNT 816-00-06400 02-13-91 THE OHIO SAVINGS BANK

02-13-91 AUTHORIZED SIGNATURE 01001395

"833407" :0640009101: 10010 157" 0305 "0005583386"

PAY ANY BANK
FRB CLEVELAND OH10-0001-M
320901835 02-13-91

TRANSOHIO 02-13-91

01001395

012450020

16-683
196

APPENDIX 6

OHIO SAVINGS BANK

May 10, 1991

Alan G. Gelbman, Esq.
2000 Standard Building
1370 Ontario Avenue
Cleveland, OH 44113

Re: Estate of Joan E. Popp
vs. William A. Hamann, Jr., et al.

Dear Mr. Gelbman:

Pursuant to the subpoena issued to Ohio Savings Bank enclosed please find a copy of the savings history for the year 1991 along with a copy of the withdrawal ticket closing the account, appointment papers, tax release, and the front and back of the check issued. The original documents are with Mr. Ramsey of the FBI.

Should you require any further information please feel free to contact us.

Very truly yours,

/s/ Ruth Michaels
Ruth Michaels
Legal Dept.

16-0006400	DO	021391	021391	D	CLOSED			328.73	.00	51,304.24		021391	D60189	D-NONE	
										CLOSEOUT INT				.00	
16-0006400						HIST-D	021391	TLR 05-000021	BAL	55,505.13	TC	B			1,503.12
16-0006400						HIST-D	021391	TLR 05-000021	BAL	55,505.13	TC	B			658.28
16-0006400						HIST-D	021391	TLR 05-000021	BAL	55,505.13	TC	B			666.48
16-0006400						HIST-D	021391	TLR 05-000021	BAL	55,505.13	TC	B			674.79
16-0006400						HIST-D	021391	TLR 05-000021	BAL	55,505.13	TC	B			698.22
16-0006400						HIST-1	021391	TLR 05-000021	BAL	55,833.86	TC	940			328.73
16-0006400						HIST-D	021391	TLR 05-000021	BAL	.00	TC	910			55,833.86
16-0006400															
16-0006400						HIST-D	021391	TLR 05-000021	BAL	.00	TC	910			

IN THE PROBATE COURT
Division of the Court of Common Pleas

1023 No. 1024992

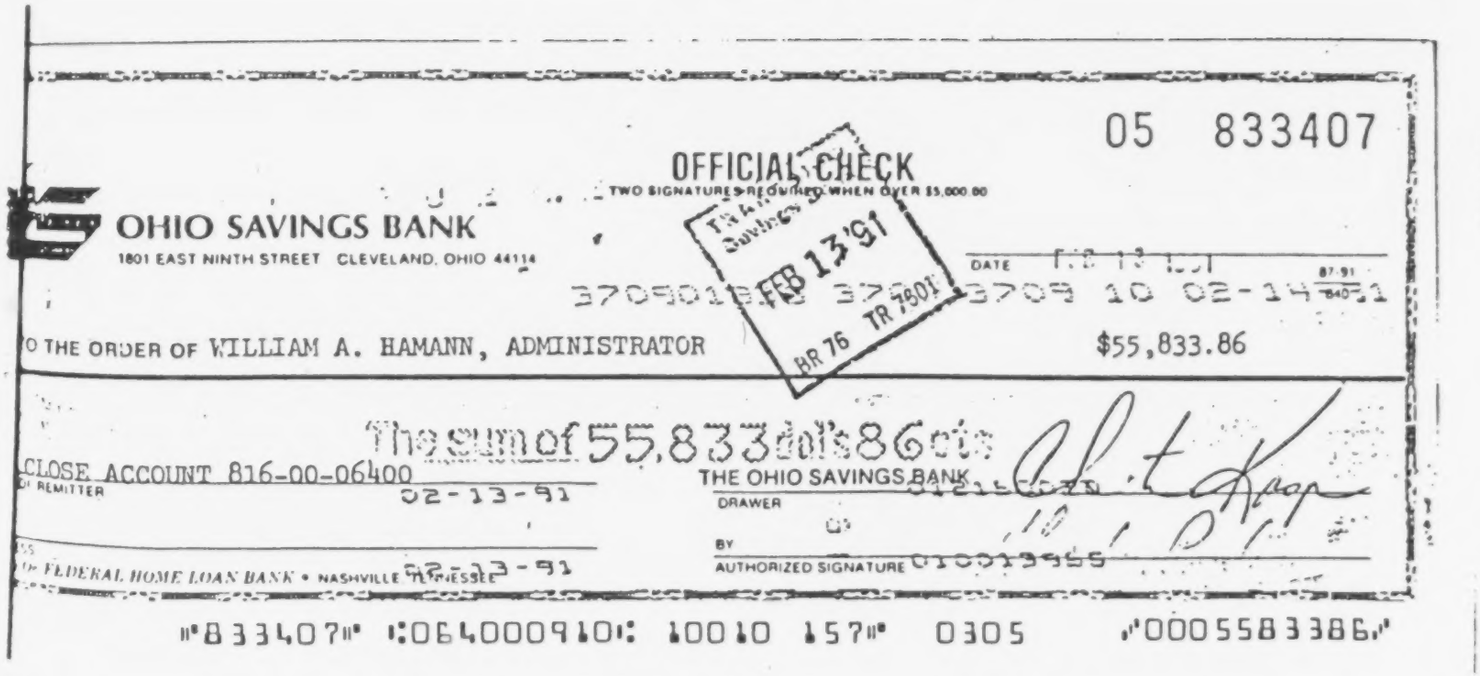
STATE OF OHIO)
) SS.
Cuyahoga County)

I, FRANCIS J. TALTY, Judge of the Probate Court and for said County, in the State aforesaid, do hereby certify and make known, that on 12th day of February one thousand nine hundred and ninety-one of Administration Of Estate of Joan Popp aka Joan E. Popp deceased, were granted William A. Hamann, Jr., Administrator

The same are now in full force and effect.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Probate Court, at Cleveland, Ohio, in said County, this 12th day of February, 1991.

/s/ John J. Donnelly
Probate Judge
By: /s/ M.M. Meyer
Deputy Clerk



05 833407

OFFICIAL CHECK

TWO SIGNATURES REQUIRED WHEN OVER $5,000.00

OHIO SAVINGS BANK

1801 EAST NINTH STREET CLEVELAND, OHIO 44114

FEB 13'91

DATE

3709 10 02-14

PAY TO THE ORDER OF WILLIAM A. HAMANN, ADMINISTRATOR

$55,833.86

The sum of 55,833 dol's 86 cts

CLOSE ACCOUNT 816-00-06400

REMITTER

02-13-91

THE OHIO SAVINGS BANK

DRAWER

BY

AUTHORIZED SIGNATURE

02-13-91

FEDERAL HOME LOAN BANK • NASHVILLE TENNESSEE

"833407" :064000910: 10010 157" 0305 "000558386"

OHIO DEPARTMENT OF TAXATION

ESTATE TAX

P.O. BOX 530, COLUMBUS, OHIO 43216

Date 2-12-91

To: OHIO SAVINGS
(NAME OF COMPANY WHOSE STOCKS OR BONDS ARE TO BE TRANSFERRED OR INSTITUTION WHERE DEPOSIT OR OTHER PROPERTY IS LOCATED)

The Tax Commissioner of Ohio consents to the immediate transfer of the following property now in your possession,

Control or custody:

To: William A. Hamann, Jr., Administrator

Description:

Acct. #816K00-06400 – $51,304.24 (6-1-89) plus interest

belonging to or standing in the name of joint name of JOAN E. POPP, deceased, late of Cuyahoga County, State of Ohio Date of Death January 30, 1991

JEAN A. FERRYMAN
TAX COMMISSIONER AGENT
BY:/s/ J.A. Ferryman
Tax Commissioner

SAVINGS ACCOUNT WITHDRAWAL
RECEIVED FROM
OHIO SAVINGS BANK

ACCOUNT NUMBER

816-00-06400

AMOUNT WITHDRAWN

55833.86
86
DOLLARS CENTS

SIGNED William A. Hamann Jr., Admr.

SIGNED DL #PM 680029

New
Address: Administrator

Check
Payable To: William A. Hamann,

Check No. 833407 /Cash
Transferred
To Account Number:

VALIDATION STAMP

[stamp] Remarks: DEATH CERTIFICATE APPOINTMENT PAPERS TAX RELEASE

SAV: 011 (REV 6/86)

PASSBOOK SAVINGS ACCOUNT

THIS CERTIFIES THAT Account No. 816 K 00 No. 06400
JOAN POPP

HAS OPENED A REGULAR SAVINGS DEPOSIT ACCOUNT WITH

OHIO SAVINGS BANK
CLEVELAND, OHIO

herein called the Bank. This passbook is issued and, by the acceptance hereof, is held subject to all the provisions of the laws of the State of Ohio, the Rules and Regulations of the Federal Savings and Loan Insurance Corporation, and the Articles of Incorporation, Constitution and By-Laws of the Bank, and to the rules contained in the Bank's Guide to Savings Accounts provided to the Accountholder at the time of opening this account, all as the same now exist or may hereafter be amended and is transferable only on the records of the Bank by the holder hereof in person, or by duly authorized attorney. Upon surrender of this passbook accompanied by a properly executed order to make said transfer. The Bank may treat the holder of record as the owner for all purposes without being affected by any notice to the contrary until this account is transferred on the books of the Bank.

Interest on deposits shall be paid as determined by the Board of Directors of the Bank and shall be subject to change without notice.

Deposits may be made through the mail by check, money order or registered letter. Always state account number. Do not send cash by mail.

All deposits are made subject to the Bank's policies on collection of checks or other items. For your protection and ours, when a check is accepted, a hold is placed on your account for the amount of checks presented for payment, in accordance with the Bank's Funds Availability Policy. Inquiries may be made at the branch in regard to information concerning the length of hold for a particular check transaction.

This book must be presented when money is deposited or withdrawn.

The owner of this account should notify the Bank of any change of address, name, or Taxpayer Identification Number.

Rev. 11/88

[seal]

ORGANIZED 1889

PASSBOOK SAVINGS ACCOUNT

THIS CERTIFIES THAT Account No. 816 K 00 No. 06400
JOAN POPP

HAS OPENED A REGULAR SAVINGS DEPOSIT ACCOUNT WITH

OHIO SAVINGS BANK
CLEVELAND, OHIO

herein called the Bank. This passbook is issued and, by the acceptance hereof, is held subject to all the provisions of the laws of the State of Ohio, the Rules and Regulations of the Federal Savings and Loan Insurance Corporation, and the Articles of Incorporation, Constitution and By-Laws of the Bank, and to the rules contained in the Bank's Guide to Savings Accounts provided to the Accountholder at the time

of opening this account, all as the same now exist or may hereafter be amended and is transferable only on the records of the Bank by the holder hereof in person, or by duly authorized attorney. Upon surrender of this passbook accompanied by a properly executed order to make said transfer. The Bank may treat the holder of record as the owner for all purposes without being affected by any notice to the contrary until this account is transferred on the books of the Bank.

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Deposits may be made through the mail by check, money order or registered letter. Always state account number. Do not send cash by mail.

All deposits are made subject to the Bank's policies on collection of checks or other items. For your protection and ours, when a check is accepted, a hold is placed on your account for the amount of checks presented for payment, in accordance with the Bank's Funds Availability Policy. Inquiries may be made at the branch in regard to information concerning the length of hold for a particular check transaction.

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The owner of this account should notify the Bank of any change of address, name, or Taxpayer Identification Number.

Rev. 11/88

[seal]

ORGANIZED 1889

PASSBOOK SAVINGS ACCOUNT

THIS CERTIFIES THAT Account No. 816 K 00 No. 06400

WITHDRAWAL	DEPOSIT	DATE	BALANCE
160A	10525.33	JUN 1-89	10525.33
160A	40778.91	JUN 1-89	51304.24
1503.12	DEC31-89	INT 52807.36	
658.28	MAR31-90	INT 53465.64	
666.48	JUN30-90	INT 54132.12	
674.79	SEP30-90	INT 54806.91	
698.22	DEC31-90	INT 55505.13	
328.73	FEB13-91	INT 55833.86	
52A55833.86		FEB13-91	.00

CANCELLED ACCOUNT CLOSED

CANCELLED ACCOUNT CLOSED

THIS BOOK MUST BE PRESENTED WHEN MONEY IS DEPOSITED OR WITHDRAWN.

ORGANIZED 1889

APPENDIX 7

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OF [sic] OHIO
EASTERN DIVISION

Ohio Savings Bank, Plaintiff, vs. TransOhio Savings Bank, and Estate of Virginia Pop [sic] Durma, and William A. Hamann, Jr., and Marvin Schatz, Defendants.	:	Case No 1:92CV2025

DEPOSITION OF WILLIAM A. HAMANN, JR., a Defendant herein, called by the Plaintiff as upon cross-examination under the statute, taken before me, A. Ann Manning, Notary Public in and for the State of Ohio, by agreement of counsel, at the Marion Correctional Institution, in the Office of O. H. Wood, III, Assistant Deputy Warden, Marion-Williamsport Road, Marion, Ohio, 43302 on Friday, May 28, 1993, beginning at 10:55 a.m. and concluding at 3:39 p.m.

APPEARANCES

FOR THE PLAINTIFF:	Roy E. Lachman Assistant General Counsel 200 Ohio Savings Plaza 1801 East Ninth Street Cleveland, Ohio 44114
FOR THE DEFENDANT R.T.C., RECEIVER FOR TRANSOHIO SAVINGS BANK:	W. Eric Baisden Attorney at Law Brouse & McDowell 500 First National Tower Akron, Ohio 44308-1471
FOR THE DEFENDANT ESTATE OF VIRGINIA POPP DURMA:	Hugh A. Carlin Attorney at Law Lakewood Center North 14600 Detroit Avenue Suite 1030 Lakewood, Ohio 44107
FOR THE DEFENDANT MARVIN SCHATZ:	George Stuhldreher Attorney at Law Gallagher, Sharp, Fulton Sixth Floor, Bulkley Building Cleveland, Ohio 44115

[p. 3] STIPULATIONS

It is stipulated by and between counsel for the respective parties that the deposition of WILLIAM A. HAMANN, JR., a Defendant, called by the Plaintiff as upon cross-examination, pursuant to the Rules of Civil Procedure, may be taken at this time by A. Ann Manning, Notary Public in and for the State of Ohio, by agreement of counsel and without Notice of other legal formality; that said deposition may be reduced to writing in stenotypy by the Notary Public, whose notes may thereafter

be transcribed out of the presence of the witness; that proof of the official character and qualifications of the Notary Public is waived; and that the examination, reading and signature of the said WILLIAM A. HAMANN, JR. to the transcript of his deposition is expressly waived by the witness; said deposition to have the same force and effect as though signed by the said WILLIAM A. HAMANN, JR.

* * *

[p. 124] A That is, that is correct.

Q When you handle estates for other people and met other fiduciaries, did you ever meet other people that acted similar to the way Mrs. Durma acted?

A Yeah.

Q In being cautious or guarded in her handlings with the attorney?

A Yes. Because most people are not – don't deal with this on a, on a routine basis and they don't know what they are up against and there's unfortunately an inbred distrust of lawyers and, uh, so, yeah. More people than not are somewhat cautious and guarded.

Q So you didn't think that her actions were anything out of the unusual? I mean you had seen this before, right?

A Yes, I had.

Q Mr. Hamann, handing to you what's been marked Plaintiff's Exhibit T, that's the forged letter of appointment of the Joan Pop [sic] Estate.

A Yes.

Q Okay. And directing your attention to February 13th, 1991, the date that you went to Ohio Savings Bank with the Joan Pop [sic] assets book.

A Yes.

Q Do you recall if Ohio Savings Bank personnel that [p. 125] day, upon you presenting this document to them, Plaintiff's Exhibit T, calling the Probate Court to verify if that was a valid estate number, if that estate had, in fact, been opened and if you were the duly qualified acting administrator of the Pop [sic] Estate?

A I do not believe that such a call was made.

Q Mr. Hamann, do you recall Ohio Savings Bank personnel on that date ever questioning you about the fact that the Probate Court seal was not clearly evidenced on the Plaintiff's Exhibit T?

A Somebody questioned me about a seal. Whether it was Ohio Savings, – in fact, um, if that's the document I remember going with a pencil, I believe, over a certificate at one of the banks. That may be. I don't remember specifically but, if there was a question, I remember taking a pencil and saying, "Look. This is raised," and shading it somehow. Other than that, I, I don't recall.

Q Was that when you were at Ohio Savings Bank?

A It may have been.

Q And you told us under prior questions of Mr. Lachman that, and I know we don't have a Plaintiff's Exhibit T copy that's showing about the seal, but you

recall when you prepared this forged document that it was in the general area of where the "John" is in the signature of John Donnelly and by the three lines of the "County" and [p. 126] "by", the word "by", b-y, near the bottom?

A (Nods head affirmatively)

Q And you recall quite clearly the words "Probate Court" did not appear on the seal that you used?

A They absolutely did not appear on the seal that I used.

[Q As you told us, you used a notarial public seal with the "notarial public" to show up, you used tape over that. On the seal what did show up was the State of Ohio and part of the seal of the Great State of Ohio?

A Correct.

Q On that date, February 13th, 1991, did Ohio Savings Bank personnel with regard to the Pop [sic] Estate question you about Plaintiff's Exhibit V, the tax release? You recall Plaintiff's Exhibit V is the tax release?

A Yes, I do recall the Exhibit and I do not recall any question about the tax release.

Q They never asked you any questions that would lead you to believe that they thought there was something unusual about this?

A No.

Q Do you recall what the original of Plaintiff's Exhibit V looked like concerning the tax commissioner's stamp?

A Well, it looked exactly like your copy there with [p. 127] the exception that, um, I believe the signature was in blue. Um, and there was no stamp. That was a typed signature block.

Q And normally when a tax release is properly issued by the tax commissioner, there's like a pre-printed ink stamp that appears near the bottom of the signature?

A That's right.

Q You recall seeing that on hundreds of tax releases, don't you?

A On every one that I did.

Q However on Plaintiff's Exhibit V, that inked tax commissioner's pre-printed stamp did not appear; is that correct?

A That's correct.

Q And Ohio Savings Bank personnel never questioned you that that ink stamp was missing from this tax release, Plaintiff's Exhibit V; isn't that correct?

A That's right. Now, let me clarify just one statement that may have been a partial misstatement. Every tax release that was issued by Cuyahoga County had the stamp on it. Tax releases that came directly from Columbus, which some did, and tax releases which came from other counties sometimes had just a signature or the typed name under or a signature with a typed name over. Not all counties used the stamp and the State of Ohio tax, uh, [p. 128] Department of Taxation down in Columbus which, on occasion, would issue a tax release on certain type of asset would not yield a stamp but all Cuyahoga

County releases that were issued from the Cuyahoga County department used the stamp.

Q And Joan Pop [sic] died a resident of Cuyahoga County, Ohio; is that correct?

A Correct.

Q And, in fact, even on Plaintiff's Exhibit V it even states:

> "Belonging to or standing in the name or joint name of Joan E. Pop [sic], Deceased, late of Cuyahoga County, State of Ohio, date of death January 30th, 1991."

Referring to the Plaintiff's Exhibit V. Therefore, the tax commissioner's printed stamp would have appeared on this tax release since she died in Cuyahoga County, Ohio; is that correct?

MR. LACHMAN: Objection.

A In my experience on every Cuyahoga County tax release that I ever got in, in 20 years had the stamp.

Q And the Ohio Savings Bank person on that day, February 13th, never questioned you that the stamp was not on this tax release, Plaintiff's Exhibit V?

A No.]

[p. 129] Q Referring you back to Plaintiff's Exhibit T, the forged certified letter of appointment, with the same date reference and the reference to the Pop [sic] Estate, did Ohio Savings Bank personnel ever question you that the certified letter of appointment starts off, "I, Francies [sic] J. Talty, Judge of the Probate Court," however –

A (Nods head affirmatively)

Q – the certified letter is signed "John J. Donnelly, Probate Judge, by" – I can't recall the signature.

A I can't either.

Q Do you remember whose name you put on there as the clerk?

A I don't – I'm not sure there is even a clerk by that name.

Q Looks like an M. M. Meyer, deputy clerk.

A Sounds reasonable.

Q Did Ohio Savings Bank personnel on February 13th, 1991, regarding the Pop [sic] Estate in Plaintiff's Exhibit T, ever question you that the printed name of Francis J. Talty in the first line is not the person who signed or had deputy clerk authorization signature of signing Talty's name but, in fact, John J. Donnelly's name is signed at the end?

A No.

* * *

APPENDIX 8

COPY

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

OHIO SAVINGS BANK	)	CASE NO: 1:92 CV 2025
Plaintiff,	)	JUDGE BATTISTI
v.	)	MAGISTRATE STREEPY
TRANSOHIO SAVINGS BANK, et al.,	)	
Defendants.	)	

DEFENDANT, RESOLUTION TRUST CORPORATION'S BRIEF IN RESPONSE TO OHIO SAVINGS BANK'S MOTION FOR SUMMARY JUDGMENT AND REPLY TO OHIO SAVINGS BANK'S BRIEF IN OPPOSITION TO RESOLUTION TRUST CORPORATION'S MOTION FOR SUMMARY JUDGMENT

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Transohio Savings Bank

I. INTRODUCTION

Whenever the Association is informed of a deceased account holder, it is their responsibility to flag the signature card on each and every account in that customer's name.

In addition to placing flags on the signature cards, the terminal hold message number "04", "DEATH NOTICE", must be entered in the terminal. Refer to the Olivetti Manual for terminal entry procedure.

The following sections are to aid in the often complicated handling of decedent accounts.

II. LEGAL DOCUMENTS REQUIRED

There are a number of legal documents required in the handling of decedent accounts. The following sections on "Procedures for Handling Each Type of Account by Ownership" must be referred to for specifics as to which documents are required. The purpose of this section is to merely provide samples of documents which may be required, and give some background knowledge as to their use.

A. Tax Release

If the Association has been advised of the death of a savings account owner, extreme care should be exercised with regard to the account from the moment of death notification to the actual disbursement of funds. The Ohio revised code 5731.39 provides in pertinent part:

"No . . . financial institution . . . having in possession, control or custody, a deposit standing in the name of a decedent, or in trust for a decedent, or in the name of a decedent and another person or persons, shall deliver or transfer an amount in excess of three-fourths (3/4's) of the total value of

such deposits, including accrued interest and dividends, as of the date of the decedent's death, without the written consent of the Ohio Tax Commission. The written consent of the Tax Commission need not be obtained prior to the delivery or transfer of amounts having the value three-fourths (3/4's) or less of said total value."

In other words, you must not permit a withdrawal of more than three-fourths (3/4's) of the balance of the savings account held in the name of a deceased account holder without first receiving a tax release properly signed by an agent of the Ohio Tax Commissioner.

In the event that three-fourths (3/4's) of the funds are withdrawn from an account without a tax release, the signature card should be flagged with the information that there is a hold on the remaining one-fourth (1/4) of the balance of the account pending receipt of the tax release. There are two exceptions to the requirement of a tax release. A tax release is not required if:

1. The account owner was not a *permanent resident* of the State of Ohio at the time of death.

2. If the account balance at the time of death is *less* than $500.00.

Following is a sample of a tax release.

B. Order Relieving the State from Administration

In accordance with the statutes as set forth by the State of Ohio, the assets of a decedent's Estate may be released without administration provided the assets totally do not exceed $15,000.00.

The next of kin, or heirs, of the decedent must file with Probate Court for an Application for Release

of Assets Without Administration. This release will set forth the name of the decedent, the date of the original application, and the date the matter came to be heard by the probate judge; it will name the person or persons to whom particular assets are to be paid. It will also list the debts against the estate, as well as the amount of money to be released. The funds in the account shall be paid to the person or persons named in the order for release of assets upon presentation of this document, together with proper identification of the person named as the recipient of the assets, a properly executed withdrawal ticket, a Tax Release, and the savings passbook. It is not necessary to obtain a copy of the Letters of Appointment, since none would be issued in the case.

The funds in the account must be paid in check form only, payable to the person or persons named in the order. Obtain a copy of the order (the court issues an order for each asset mentioned) for the permanent records of the Association. Note on the withdrawal ticket the fact that the withdrawal was made pursuant to such an order.

The following is a sample of an Order Relieving the Estate from Administration:

III. CONVERTING, TRANSFERRING, AND CLOSING PROCEDURES FOR DECEDENT ACCOUNTS

REFER TO SECTION ON "PROCEDURES FOR HANDLING EACH TYPE OF ACCOUNT OWNERSHIP" FOR PROPER USE OF THESE PROCEDURES.

A. Closing or Transferring a Decedent Account

When the Executor, Administrator, survivor, or properly authorized person presents the proper

documents, a decedent account may be closed by the following procedures.

1. Note on the signature card that the owner is deceased and the date.

2. Have the Executor, Administrator, survivor or properly authorized person complete a withdrawal ticket.

3. Attach required documents to the withdrawal ticket.

4. Proceed to close the account.

[5. In the case of an Estate Account, the check *must* be made payable to "The Estate of (deceased account owner)" or to "John Smith, Executor of the Estate of (deceased account owner)".]

If the surviving owner is closing the account, he may have the funds in any form he wishes.

In the case of a Successor Trustee, Guardian, Custodian or Fiduciary, the check must be made payable to the Successor.

REFER TO SPECIFIC TYPE OF OWNERSHIP FOR DETAILS.

6. An account may be transferred to a new account, in any form of ownership, after completing the above. If a check is required for close-out, simply have the customer endorse the check and open the new account.

* * *

(3)

No. 94-1232

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In The

Supreme Court of the United States

October Term, 1994

OHIO SAVINGS BANK,

Petitioner,

vs.

THE ESTATE OF JOAN POPP,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Ohio, Eighth District

REPLY BRIEF

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REPLY BRIEF

Respondent has raised a number of new and potentially misleading issues in its Brief in Opposition. Petitioner has addressed them below by numbered paragraphs.

1. Respondent has relied heavily on materials that are not in the record before this Court, but in the record of other, separate proceedings involving Petitioner and non-parties hereto:

(a) Brief in Opposition, page 7, middle, to page 8, bottom of top paragraph;

(b) Brief in Opposition, page 18, paragraph 2;

(c) Brief in Opposition, page 19, paragraph 3; and

(d) Appendix, pages 18 through 30 (depositions and briefs in another case).

These materials should be disregarded.

2. Respondent has contended at length on page 9 of its Brief that an action under Ohio Revised Code Sections 2109.50-2109.52 is a civil action only, and has cited several older Ohio Court of Appeals cases as support. However, Respondent has deliberately ignored the Ohio Supreme Court's holding that "the special proceeding instituted on such a complaint is *quasi-criminal* in character." *Goodrich v. Anderson*, 136 Ohio St. 509, 512, 26 N.E.2d 1016 (1940) (emphasis supplied). This decision has not been overruled, and remains good law in Ohio.

3. Respondent has apparently argued (Brief, pp.12-17) that, since no incarceration was imposed on Petitioner, but a felony-level fine, no criminal conviction occurred. However, Respondent has missed the point presented in Petitioner's "Questions Presented for Review": that it was convicted upon summary judgment, and suffered punishment at the level of a felony.

Moreover, Respondent has ignored the obvious fact that Petitioner, a savings institution, could not by definition have been "incarcerated." Individuals are incarcerated, not corporations. Monetary or injunctive penalties are imposed upon corporations. This is what occurred here.

Finally, Respondent has failed to note that, while the penalty imposed upon Petitioner was at the level of a second-degree felony for individuals, Ohio Revised Code Section 2929.11(C)(2), it was also at the level of a fourth-degree felony with respect to organizations such as Petitioner:

> (A) Regardless of the penalties provided in sections 2929.02, 2929.11, and 2929.21 of the Revised Code, an organization convicted of an offense pursuant to section 2901.23 of the Revised Code shall be fined, which fine shall be fixed by the court as follows:
>
> * * *
>
> (6) For a felony of the fourth degree, not more than ten thousand dollars.

O.R.C. § 2929.31

In short, whether the fine was at the level of a felony of the second or fourth degree is immaterial, since Petitioner was effectively convicted of a crime without *mens rea* or any willful wrongdoing. Respondent has failed to address Petitioner's substantial Constitutional issues in this regard, and has instead relied on the simplistic notion that, since the Bank was not incarcerated, then by definition it was not convicted of a crime. The Court should reject such a facile argument.

4. Respondent has argued that the ten percent (10%) penalty imposed on Petitioner "is the equivalent to the 10% interest rate applicable to a plaintiff [sic] judgment in a civil proceeding required by § 1343.03(A) of the Ohio Revised Code." Br. at 11. What Respondent fails to mention is that the judgment against Petitioner was for

"$55,833.86 *plus* the 10% penalty thereon *plus* interest at the rate of 10% per annum . . . " (Petitioner Appendix 25; Judgment Entry of November 3, 1992, emphasis supplied.) In short, the ten percent (10%) penalty imposed on Petitioner was in addition to interest on the judgment, not a substitute or "equivalent" therefor.

5. Respondent has contended that Petitioner waived its right to a jury trial by filing a Motion to Dismiss and/or For Summary Judgment. Br. at 19. This makes no sense. As the record below shows, the trial court established deadlines for filing such motions. Nowhere did Petitioner *waive* its right to a jury trial. Quite the contrary, it made a jury demand. By Respondent's illogic, every time a party files a dispositive motion – whether in a civil proceeding or a criminal one – it would waive the right to a jury trial. Respondent has furnished no authority to support this startling contention for the simple reason that there is none. Nor does the filing of such a motion concede that Respondent's claim was civil rather than criminal. Quite the contrary: in all pleadings, Petitioner asserted that the proceeding was improperly brought as a quasi-criminal or criminal action.

For the above reasons, a writ of certiorari should be granted so that the substantial Constitutional issues – largely ignored by Respondent – may be squarely addressed.

Respectfully submitted,

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